1987

Formen Corporation v. Mel Parks : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

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FORMEN CORPORATION, a Utah corporation, DON SKIPWORTH, and FRED SMITH,

Plaintiffs-Appellants,

870510-CA

vs.

Appeal No. ~~20426~~

MEL PARKS, PARKS ENTERPRISES, INC., an Idaho corporation, NASKY JOINT VENTURE, a partnership, DEL TAYLOR, NANCY TAYLOR, his wife, HAL PARKS, JERRY PARKS, STARLA PARKS (now STARLA MAYERS), BRYCE AVERILL, HARRY KEITH HUFFAKER, ELZA HUFFAKER, his wife, THOMAS GENE REID, MARY REID, his wife, and WANDA HOPPER,

Defendants-Respondents.

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BRIEF OF APPELLANT

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Appeal from the Judgment of the
Sixth Judicial District Court, Sanpete County
Honorable Don V. Tibbs

- -

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LIST OF PARTIES

The parties to this litigation are listed as follows:

Plaintiffs-Appellants

1. Formen Corporation, a Utah corporation,
2. Don Skipworth, and
3. Fred Smith,

Defendants-Respondents

1. Mel Parks,
2. Parks Enterprises, Inc., an Idaho corporation,
3. Nasky Joint Venture, a partnership,
4. Del Taylor,
5. Nancy Taylor, his wife,
6. Hal Parks,
7. Jerry Parks,
8. Starla Parks (now Starla Mayers),
9. Bryce Averill,
10. Harry Keith Huffaker,
11. Elza Huffaker, his wife,
12. Thomas Gene Reid,
13. Mary Reid, his wife, and
14. Wanda Hopper.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the lower court err in awarding judgment against the Plaintiffs, jointly and severally, for attorney's fees where the Defendants failed to prove that the Plaintiffs' Claim was "without merit" and "not brought in good faith" as was asserted by the Defense, and where the claims as presented by the Plaintiffs were of significant weight and importance having substantial basis in law and in fact.

2. Did the lower Court err in granting judgment against the Plantiffs under rule 41 B at the conclusion of the Plaintiffs' case in view of substantial evidence which was presented in support of Plaintiffs' First Cause of Action - Tortious Interference.

3. In particular regard to the Plaintiffs' Second, Third, and Fourth Causes of Action - Slander, did the lower Court err in granting Defendants' Motion pursuant to Rule 41(b) to Dismiss Plaintiffs' action when Plaintiffs demonstrated sufficient evidence supported at the trial by the testimony of numerous witnesses so as to create factual questions based in law setting forth the validity and merit of Plaintiffs' Complaint.

4. Did the lower Court err in awarding judgment on the Defense Counterclaim for reformation against Formen Corporation such that water would be provided without cost in accordance with the terms designated in the Judgment, when the Defendants' claim was unfounded and not supported by documentation.

5. Did the lower Court err in granting summary judgment to crossclaimants Bryce Averill, Jerry Keith Huffaker, Eliza Huffaker, Thomas Gene Reid and Mary Reid, against Formen Corporation, for a refund of monies paid to Formen Corporation; was there error in granting summary judgment to crossclaimants removing Plaintiffs' cause of action for Injunctive Relief. In both cases, Plaintiffs' claims were supported with genuine issues of material fact presented in trial and pre-trial discovery. Was the granting of summary judgment inappropriate in view of the Statute of Limitations upon the time in which crossclaimants could make their complaint, and in light of the jurisdictional limitations of the Court.

6. Did the lower Court err in the dismissal of Plaintiffs' Fifth Cause of Action for Negligence against Defendant Mel Parks, and in the dismissal of Plaintiffs' Sixth Cause of Action for Antitrust Violations against all Defendants where the rulings of the Court in pretrial discovery at depositions prevented Plaintiffs from obtaining relevant testimony to the above claims, and information important to the development of Plaintiffs' case on these issues; there was applicable and supportive testimony presented at trial on these points.

7. Did the lower Court err in making prejudicial Evidentiary Rulings throughout the course of this action in both pre-trial and trial rulings. The Court rulings appeared biased and prejudiced in allowing Defense objections, denying Plaintiffs' objections, preventing testimony in discovery and

trial, and in allowing Defense Counsel to testify asserting personal opinions as to the justness of the Plaintiffs' causes of action in violation of Rule DR 7-106, Trial Conduct, Canon 7.

STATEMENT OF THE CASE

This action was originally commenced in January of 1983 by the Plaintiffs against the Defendants claiming that the Defendants had conspired against and slandered the Plaintiffs to such an extent as to significantly prevent the Plaintiffs from conducting ordinary and common business, and Plaintiffs were damaged accordingly. Concurrently, Plaintiffs incorporated in their complaint a sixth cause of action against all Defendants for Antitrust Violations. Plaintiffs sought relief for wrongfully terminated contracts as a result of the tortious interference, slander, antitrust violations and actual damages for resulting sales losses plus interest loss, together with punitive damages, reasonable attorney's fees, and costs of Court.

The matter came before the Court, sitting without a Jury, on Monday, the 27th day of August 1984, before the Honorable Don V. Tibbs, District Judge for Sanpete County, in the Courtroom of the Sanpete County Courthouse at Manti, Sanpete County, State of Utah. At the conclusion of Plaintiffs' case Defendants moved to dismiss and the said motion was granted. Defense witnesses were subsequently called and examined, particularly in regard to Defense Counterclaims. The matter was submitted without argument.

In connection with the counterclaim the Court requested that the parties provide to the Court the figures representing the balance which was due on the water contract from Formen Corporation to Rennert Investment Company on December 31, 1980.

The Court ordered that both sides should submit post trial memorandum briefs within fifteen days to address the Defense damage questions as to Attorney's fees and Defendants claim for water rights, whereupon the Court stood in recess, Friday, the 31st day of August, 1984. The Court Order was set forth on the 30th day of October, 1984, and the Judgment was entered and signed by the Court on the 11th day of December, 1984. (Copies annexed hereto as part of the Addendum.)

The lower Court found that the Plaintiffs' case was without merit and lacking in good faith, and Defendants were awarded Judgment for a Decree of Reformation such that Plaintiffs must provide water without cost to Parks Enterprises, Inc. The Court also ordered Plaintiffs to pay Attorneys fees and costs amounting to $35,571.80.

It is in response to the decision of the lower court granting Defendants' Motion for Summary Judgment to Foreclosure Crossclaimants, and granting Defendants' Motions to Dismiss and in response to the subsequent Judgment and Order that this present appeal is now hereby taken by Plaintiffs-Appellants.

STATEMENT OF FACTS

The following facts were established at trial and are not in dispute.

The Plaintiffs and Defendants entered into an agreement pursuant to which the Plaintiffs and the Defendants Parks developed a project in Sanpete County, Utah known as Elkridge Subdivision. The project was successful and the parties to that agreement commenced the development of a neighboring project referred to as Hideaway Valley. It was in connection with that project that disputes arose between the Plaintiffs and the Parks, (Hal Parks, Mel Parks, Parks Enterprises) and Del Taylor and they entered into a separation agreement pursuant to which executory contracts, water rights and property ownership was divided. Parks purchased a neighboring property and commenced action on it in the sales of lots and named it the Blackhawk Subdivision.

A property owners association was formed to care for and maintain the common area in Hideaway Valley and purchasers of lots in Hideaway Valley began to move onto the project and establish cabins and homes.

According to the Plaintiffs and the allegations set forth in the Complaint, the Parks, (Mel Parks, Hal Parks, Parks Enterprises) and Del Taylor, had various meetings with the remaining Defendants and according to the Plaintiffs embarked upon a campaign of slander during the process of which prospective and existing lot purchasers were contacted and dissuaded from purchasing lots or continuing their lot purchases.

The Plaintiffs claim that the following testimony clearly establishes the Defendant's intent to embark upon

Tortious Interference and Slander; evidence of communications by which it was carried out and evidence of the direct damages caused thereby.

Don Skipworth testified at the trial as follows:

> A And, at that time, Del Taylor and Mel Parks and Fred Smith was in a conversation and Fred was asking him also, "Couldn't we sit down and resolve our differences," as [sic] Taylor says, "No, we've got something coming for you."
>
> Q What did Mr. Smith say?
>
> A He says, "Well what are you going to do shoot me?" and Del Taylor says, "No, I'm not going to shoot you but it's a fate worse than death and you will wish you were dead." (Trial Transcript Page 73 Line 25 to Page 74 Line 8)

That statement was made in early January of 1983.

Mel Parks and Del Taylor invited a group of lot owners to a meeting at their large family complex on the project on August 15, 1982 (Trial Transcript Page 76 Lines 1-18)

At that meeting Don Skipworth quoted Bryce Averill as follows:

> A Bryce Averill made the statement that Formen Corporation was being cheated by Fred Smith on its charges to Formen Corporation and then Fred Smith and Max Smith cheated the people on their - - (Trial Transcript Page 81 Lines 16-19)

Witness Anthony Escobar who was interested in purchasing a lot in the subdivision was retained by Formen Corporation to investigate the situation and ask questions of the Defendants. (Trial Transcript Page 197 Line 13 through Page 198 Line 4)

At the time Fred Smith was a trustee of the association, Mr. Escobar quoted Elza Huffaker as follows:

A We were told that they didn't know where the Association funds were going and that they could not keep track of the funds or where they were being spent and so on. (Trial Transcript Page 199, Lines 15-18)

And further as follows:

A. Well, that Fred Smith was trying to buy up all the water and that nobody -- that it was difficult to get water and there was not enough water for cabins to be built on and so forth -- and that I can't -- it was a while ago but something to do with Clear Water, drilling and Clear Water and that he was getting overrides from Clear Water Drilling, or funds returned on Clear Water Development and Clear Water Drilling. (Trial Transcript Page 200, Lines 12-19)

And further:

A That the property was recreationally zoned and that it was difficult to get a building permit. (Trial Transcript Page 201 Lines 22-23).

Mr. Escobar also spoke with Bryce Averill:

Q What did he say?

A That you can't believe anything that they say.

Q That who says?

A That Fred Smith says.
(Trial Transcript Page 203, Line 10-14)

When Mr. Escobar stated to Defendants Bryce Averill and Gene Reid that he was thinking of buying a lot, they made the following statement:

A Bryce Averill and Gene Ried said, "You don't want to buy a lot until you find out exactly what you're getting into," and Gene Reid indicated the same thing and comments came from all parties to that respect. (Trial Transcript Page 204, Lines 5-8)

Bryce Averill further stated:

A He indicated that I couldn't -- that I could only bring in one stick at a time because I can't have any lumber sitting on the property and that they would make it difficult for me to build. (Trial Transcript, Page 204, Lines 20-23)

The testimony of Mr. J. Fred Smith demonstrated Plaintiff's case for tortious interference and slander. He testified that during the spring of 1982 he was informed by Mel Parks that Mr. Parks had purchased the balance of the Black Hawk Project and that "because he was cheated on the Hideaway Valley Project that he was going to put us out of Business." (Trial Transcript Page 247, Lines 1-11) Mr. Smith went on to explain that he remembered those words "Put us out of business" exactly, and he was "shocked" because at that point he never even knew there was a problem. (Trial Transcript Page 247, Lines 15-20)

In response to numerous phone calls as a result of the "More Fireworks" letter, Mr. Smith testified that he expressed concern to Mel Parks "that what he was spreading around the country was going to do us some irreparable harm."

> Q Now, precisely what did you say to express that concern?
>
> A I said that we were having some people terminate their contracts because of what he was allegating and talking about that we were crooks, cheats, and liars around the subdivision and to the county officials and we were losing customers and it was costing us some money and I insisted that he stop it. (Trial Transcript Page 262, Lines 9-25)

The harm done to Formen Corporation resulted in a new category for defining contract cancellations:

> Q And what are some of those categories that you fit those cancellations into?
>
> A Sickness, unemployment, lack of interest, and then recently the crooks, cheats and liars comments that the Parks were involved with. (Trial Transcript Page 286, Lines 1-5)

Mr. Smith testified that in April of 1981 Mel Parks said he could do business with him but that "Ted Bradford and Don Skipworth were crooks, he couldn't stand them and he just wouldn't do business with them and that he was going to get them if he could".

Fred Smith summarized the malicious threats and intent of Defendant Del Taylor in his testimony as follows:

> A Del Taylor said, "Your problems are just beginning." I says, "Well, the worst you can do is shoot me and then I'd be out of all the misery", and he says, "We have" - - Del Taylor says, "We have a fate worse than death in store for you", and I asked him what that could possibly be and he left without answering it. (Trial Transcript Page 306, Lines 10-15)

Witness Louis K. Sharp testified that Del Taylor had advised him not to pay his Property Owner's Association dues because Fred Smith was undermining the Association and misusing the Association's funds. (Trial Transcript Page 313, Lines 2-6) As requested, Mr. Sharp did not pay his dues. He said that he "was getting fairly disgusted with the situation of being felt like I was being caught in the middle of something I wanted no part of."

Mr. Sharp is no longer an owner in that project "Because I got tired of paying for a dead horse."

> Q Now, when you say "a dead horse" what do you mean?
>
> A I mean that the property was virtually worthless.
>
> Q And why was it worthless?
>
> A Because I could not sell it.
>
> Q Do you know why you couldn't sell it?
>
> A Because of the rumors, several rumors, that were floating around. (Trial Transcript Page 314, Lines 3-13)

This single cancellation represented a net loss to Formen Corporation, present and future, of $10,824.40 as demonstrated in the testimony of Donald Ray Skipworth. (Trial Transcript Page 558, Line 6)

Witness Gary Christiansen testified that he was thinking of buying a lot in the Plaintiffs' project and that he spoke to Defendant Bryce Averill and told him that. (Trial Transcript Page 514, Lines 7-11) Whereupon Defendant Bruce Averill said:

> To the best of my recollection was that Fred Smith was a liar and never kept his promise, you could never get a land deed, and you could never get any water rights from him and about that time I got a little mad and I didn't say anything but I paid for our breakfast and left to finish my job and I drove to Fred's property. (Trial Transcript Pge 514, Lines 15-20)

Mr. Christiansen decided not to buy a lot. (Trial Transcript page 515, Lines 5-15)

Witness Brad Craig testified that Mrs. Gene Reid (Defendant Mary Reid) told him the Plaintiffs couldn't deliver water rights they had purportedly sold to Mr. Craig.

> Q What did you say and what did Mrs. Reid say on that occasion?
>
> A Well, the occasion started when we were talking about our lots and they were next to each other, and I had purchased some water rights. They told me they had no right to sell any water rights because Formen Corporation did not have any water rights to sell me.
>
> Q Who said that?
>
> A Mrs. Gene Reid.
> (Trial Transcript page 528, Line 22 to Page 529, Line 10)

Further:

A Mrs. Gene Reid said that Fred and Max Smith were liars and cheats and that anything they did for the subdivision that they were pocketing the money. . (Trial Transcript Page 529, Lines 18-20)

Witness Craig further testified:

Q What did you say and what did Mr. Averill say?

A Well, we were talking about the lots and what was going on up there and he told me that Formen Corporation was nothing but a scam to get people's money and that their main objective was to foreclose as soon as they had possible time to do and they were liars and cheats. (Trial Transcript Page 530, Lines 7-14)

Further:

Q Did Mr. Averill ever mention anything to you about the deed to your land?

A Yes, he did. He also said that I couldn't get a deed to my land even if I did pay for it. (Trial Transcript Page 530 Lines 18-23)

Frank Pino, a lot owner in Hideaway Valley, testified that Defendant Del Taylor (at a meeting also attended by Defendant Mel Parks and Mr. Taylor's father-in-law) told him that Plaintiff Fred Smith was wrongfully taking money from the homeowners association. He testified as follows:

Q What did Mr. Taylor say on that occasion?

A Well, not to pay my assessments and that Fred Smith was high on his prices and on his equipment.

Q Was the subject of what would happen on the assessment money discussed?

A Yes. They said Formen Corporation and Fred Smith was taking all the money and not to do anything. (Trial Transcript Page 544, Line 23 to Page 545, Line 4)

Witness Pat Mounteer testified that she terminated her lot purchase because of all the problems that existed at the

subdivision and specifically that she, as the secretary for the association, was not able to participate in meetings as of interference at at least one meeting from Del Taylor. (Trial Transcript Page 441, Line 23 through Page 442, Line 6)

Witness Leslie Wallace Roach testified that as a result of receiving Exhibit 35 in the mail, and similar correspondence, that he terminated his contract. (Exhibit 35 is attached to this brief as an exhibit. This was a letter composed and sent by the Defendants.) (Trial Transcript Page 434, Line 6 through Page 435, Line 14)

Witness LaMar Macklin stated that he resigned from his position as trustee of the Property Owners Association as a result of derogatory comments about Formen Corporation made by Mr. Taylor at the Property Owners Association meeting. (Trial Transcript Page 500, Line 25 through Page 501, Line 12)

Certified Public Accountant Frank Stuart testifed regarding damages and introduced Exhibit 46 which was admitted into evidence.

The Plaintiffs alleged in their Complaint that the slander and tortious interference commenced in May of 1982. The Court restrained the Defendants from slandering the Plaintiffs on February 2, 1983.

Exhibit 46 shows that sales for the Plaintiff Formen Corporation were 215 lots for 1981 with 33 cancellations. Exhibit 46 shows that sales for 1982 were 95 with 68 cancellations. Exhibit 46 shows monthly sales during this relevant period as follows:

1982			1983
January	3		8
			Injunction
February	2		16
March	5		24
April	12		11
May	11	(Alleged Inception of slander and tortious interference	
June	18		
July	4		
August	9		
September	11		
October	6		
November	8		
December	6		

From the foregoing it can be seen that sales fell off shortly after the alleged inception and increased immediately after the injuction.

Mr. Stuart using the 1981, 1982 and 1983 figures testified that in his opinion the Plaintiffs were damaged in the amount of $3,600,000.00 (Trial Transcript, Page 401, Lines 1-5)

The rulings of the Court can best be demonstrated in fact by the actual record of the Transcript of Preceedings of Trial wherein Plaintiffs were prevented from questioning witnesses as to relevant information in support of their concerns.

As to speculative testimony, Plaintiffs' Counsel objected to Defense questioning, Tr. Vol. I, page 114; Objection Overruled.

As to the assumption of facts not in evidence, Plaintiffs' Counsel objected to Defense questioning, Tr. Vol. I, Page 145; Objection Overruled.

As to Plaintiffs' Objection to Defense Questioning, regarding the assumption of a fact belied by all of the evidence,

Tr. Vol. I, page 179; Objection Overruled.

As to Plaintiffs' Objection to Belaboring Questioning, Tr. Vol. I, page 184; Objection Overruled.

There is a question as to whether the lower Court had already made up its mind in this matter prior to hearing the evidence. Regarding a question of reading language which could possibly be construed to be slanderous, the Court said:

> Just jump over the language and let the Supreme Court read it if they want to.
>
> Tr. Vol. I, page 233, lines 9 and 10.

Plaintiffs' Objection to irrelevent information was overruled, Tr. Vol 1. page 233, lines 15 through 19.

As to Defense Objections as to Plaintiffs' questioning regarding applications on file with the Court, Defense objections were Sustained and Plaintiffs' witness was unable to testify as to any implications of the application, Tr. Vol II, pages 245 and 246.

The Defense motion to strike relevant commentary in response to Plaintiffs' questioning regarding title report and title opinion claims was sustained and the answer remains barred from the record, Tr. Vol II., pages 253, 254.

The next few questions were also objected to by Defense Counsel, and sustained by the lower Court. The following discussion occurred:

> MR. SUMMERHAYS: Your Honor, for the record, we would profer an additional line of questions on the same subject and I assume that the objections would be similar and you would rule the same way.
>
> THE COURT: Don't assume anything, Counsel. I don't want you assuming anything. You try the case like you feel and I'll rule like I feel I should rule and then,

if somebody's made a mistake, it will be on the record. Tr. Vol. II, page 254, lines 17 through 24.

Defense Objection was sustained upon testimony vital to Plaintiffs' case. Plaintiffs' counsel explained as follows:

> MR. SUMMERHAYS: Your Honor, this is a critical evidentiary issue in our case and Mr. Smith, as the President of the company, is entitled to testify regarding general business conditions that affect his company. Now, you know, we've had numerous communications with people complaining that so-and-so said so-and-so and I do have a hearsay problem, but we think clearly that Mr. Smith is entitled, if he gets a barrage of telephone calls and arguments to merely reflect the condition that existed in his business as a result of the statement by the Defendants... (Tr. Vol. II. page 257, lines 14-24)

The discussion continued, culminating with:

> MR. SUMMERHAYS: We have the burden to summarize the business conditions for Formen. We are having a number of witnesses come in and I think we will burden the Court even with the number we have but on each episode they stirred up tremendous impact on the business, tremendous numbers of communications. We can't bring in hundreds and hundreds of people to describe all of that.
>
> THE COURT: The objection is sustained, Counsel.

Another such instance occurred Tr. Vol. II, page 269, page 270, where Defendants Objected to critical information perceived by Plaintiffs to be relevant and not hearsay. The Court said "I don't see how it's relevant. Maybe I'm mistaken." Plaintiffs' counsel explained that it is necessary to lay a foundation to show what business events occurred during the episode of slander. Nevertheless, the Court Sustained Defense Objection that "it's immaterial, irrelevant and hearsay".

Plaintiffs' counsel asked (Tr. Vol. II, page 283, lines 4 and 5) "how many projects have you developed as of that point?"

Objection by Defense was sustained. Plaintiffs' counsel asked next (Tr. Vol II, page 183, lines 13 and 14) "do you have an opinion, Mr. Smith, as to why your sales were down in '82?" This objection was also sustained.

From this point on there were repeated Objections to Plaintiffs' questioning which were likewise Sustained.

Objection was made and sustained as to Plantiffs questioning sales levels following the appropriate foundational questioning. See Tr. Vol. I, pages 288 through 289, which reads as follows:

> Q Now, you normally have high sales. Do you know or can you give us any reason to explain why your sales plummented in July of 1982, and continued low throughout that summer?
>
> A. Yes.
>
> MR. HOWARD: Objection, no foundation laid.
>
> MR. SUMMERHAYS: Well, it's right there, Your Honor, in front of us.
>
> THE COURT: The objection's sustained.
>
> MR. SUMMERHAYS: May I get the grounds for the Court's ruling?
>
> THE COURT: I don't think there's any foundation for it, Counsel. I think it becomes just so remote.
>
> MR. SUMMERHAYS: That he can't explain why he thinks his sales went down?
>
> THE COURT: Well, I think he's got to have a basis. I don't think he can come up with an assumption because of the graph that he had run out on the computer.

Plaintiffs were unable to present testimony and to have pertinent exhibits accepted by the lower Court. Objections followed the entire line of questioning which was necessary to lay foundation, and to demonstrate the very concerns raised which

eventually necessitated the initiation of this litigation. Similar rulings and courtroom misunderstandings will be found in Tr. Vol. II. pages 294, 295, 297, 298, and 299.

The extent of the Defense barrage of objections is exemplified as follows:

> MR. HOWARD: Your Honor, I'm going to object to the conversation regarding rumors. It may very well be that rumors were floating around but that doesn't --
>
> MR. SUMMERHAYS: He hasn't said anything about a conversation.
>
> MR. HOWARD: I just want to make my objection in advance.
>
> Tr. Vol. II, page 314, lines 14 through 20.

The same grounds upon which the Court sustained Defense objections to questioning regarding documents as to the best evidence, are the grounds upon which the Court overruled Plaintiffs' objections for the same reason. (Tr. Vol. II, page 323)

Another example of court bias in rulings is demonstrated in Tr. Vol II, page 325, lines 16 through 19:

> MR. SUMMERHAYS: We'll object, Your Honor, it's repetitious and it's also immaterial; that's immaterial here on that line of questioning.
>
> THE COURT: The objection's overruled.

Similar examples followed in Tr. Vol. II, pages 331, 333, 338, and 355.

Defense objections were sustained as to the line of questioning setting forth damage cases to be relied upon in support of the economist's testimony as to Plaintiffs' damages. (Tr. Vol. II, page 386, lines 2 through 10.)

In Tr. Vol. II, pages 469 through 479 the line of questioning from Plaintiffs' counsel to Mr. Ross Blackham, Sanpete County Attorney, was objected to by Defense counsel and sustained by the Court. The objection was that it was irrelevant and immaterial testimony. Plaintiffs' counsel endeavored to explain the very important relevance of this testimony to the Court. It was critical to Plaintiffs' response to Defense Counter-Claim to show that Plaintiffs' actions were within the boundaries of law and order. Defendants had alledged that Plaintiffs had improperly developed and sold unregistered property in violation of the zoning ordinance, which is a criminal offense. To accuse someone of a criminal action where there was no criminal activity is to Slander someone. Plaintiffs were in this instance not allowed to present relevant testimony as to the legality of their actions. This Court ruling may have been predicated upon pre-existing bias as reflected in Tr. Vol. II, page 479, lines 13 through 22 which went as follows:

> THE COURT: I love you, Mr. Blackham, but I just don't care what you think.
>
> A Thank you.
>
> (Witness Excused).
>
> THE COURT: And I can tell you that Mr. Blackham doesn't care what I think most of the time.
>
> Now, have you decided whether you want to call him or not?
>
> MR. SUMMERHAYS: I don't want to call him, Your Honor.

In Tr. Vol. III, page 518 through 522, Plantiffs' counsel was not allowed to ask questions demonstrating the impact in the community of the effect of the slander which is one of the

elements Plaintiffs need to show in a Slander case. On page 523 Defense Objections were Sustained such that Plaintiffs' counsel could not ask questions regarding water title. On page 524 Defense Objection was Sustained as to questioning regarding bad feelings. On page 534 Plaintiffs' objections were overruled as to Defense counsel suggestions to the witness and as to repetitious and harassing questioning.

It is clear that the weight of the Court's prejudicial evidentiary rulings, as demonstrated in the above facts, favored the Defendants by the very nature of the rulings barring Plaintiff's case presentation. The transcript of the pre-trial deposition of Mel Parks, taken before the Court, will reveal many additional such ruling indicative of a predisposition and prejudice on the part of the Court.

SUMMARY OF ARGUMENTS

The lower court erred in awarding Attorney's Fees, office and court costs totalling $35,571.80 to the Defense where Defendants failed to prove bad faith on the part of the Plaintiffs. Plaintiffs instituted the proceedings in this matter with good faith, and with the belief that they were damaged by the wrongdoings of the Defendants. From the time of the initiation of this suit, through discovery and through the trial, Plaintiffs have contended that they were wronged by the Defendants, and in good faith, they attempted to prove their damages. Plaintiffs have spent a good deal of time, effort and

money in the furtherance of their cause, and would not have done so if it were not with the belief that they were entitled to the relief sought in their pleadings.

The lower court erred in dismissing Plaintiffs' causes of action for Tortious Interference and for Slander since the court mistakenly concluded, as a matter of law, that Plaintiffs had failed to prove a prima facia case either on liability or on damages, that Plaintiffs had not proven any tortious interference from the evidence the Court heard, that Plaintiffs had not proven any slander, malice, or falsity, and that Plaintiffs' damages were so general and speculative as to not be worthy of consideration.

The lower court erred in awarding judgment to Defendants for reformation of the "Memorandum of Partnership Dissolution Agreement" which agreement was previously entered into on the 31st day of December, 1980, and which agreement was properly executed and attested to by parties of both parts, which agreement speaks for itself and was established well prior to the initiation of this litigation, and which agreement is in and of itself a document setting forth the contractual rights and understandings of both parties for the very purpose of defining rights so as to prevent this type of misunderstanding.

The above matters are questions of fact and of law which were supported in evidence, much of which was not allowed to be heard at the trial. Further, the Court seemed to have held written contractual agreements as inconsequential as to assumed understandings of what ought to be.

The lower Court improperly granted Summary Judgment to crossclaimiant, foreclosure Defendants where genuine issues of material fact should have been tried rather than ruled on in a motion, and where there are factual questions as to the Court's jurisdiction and as to Defendants' violations of the Statute of Limitations.

The extent to which the Court did not hear supportive evidence was largely due to the Court's evidentiary rulings preventing Plaintiffs' case from being heard. Initially the lower Court, in presiding for the taking of the deposition of Mel Parks, prevented testimony by sustaining Defense objections such that Plaintiffs were unable to develop the facts in support of their claims for negligence against Defendant Mel Parks; and concurrently Plaintiffs were prevented from obtaining testimony corroborating their case of Antiturst Violations. Nevertheless, there are substantial facts presented for review in this appelant brief to show cause why Plaintiffs complaint for Antiturst Violations should have been heard at the trial.

The lower Court was incorrect to have erroneously excluded testimony upon relevant questioning which was repeatedly objected to by Defense Counsel, and repeatedly sustained by the Court. Similar objections by Plaintiffs' Counsel were frequently overruled. The rulings of the lower court were predictably consistent and served to preclude Plaintiffs case from being heard while admitting Defense testimony notwithstanding Plaintiffs objections and rights. Further, the lower Court allowed Defense Counsel to render prsonal opinion in trial

testimony as the merit and intent of Plaintiff's Complaint in violation of the Canon of Ethics.

ARGUMENT

THE LOWER COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE DEFENDANT ABSENT A SHOWING THAT (1) THE ACTION WAS WITHOUT MERIT AND (2) THAT IT WAS NOT BROUGHT OR ASSERTED IN GOOD FAITH.

This Court has recently interpreted UCA 78-27-56 in an opinion by Justice Howe, Cady v. Johnson, 671 P2d. 149 (Utah 1983). The Court stated at page 151:

> This statute is narrowly drawn. It was not meant to be applied to all prevailing parties in all civil suits. To safeguard against too broad an application, two elements are required in addition to being prevailing party. First, the claim must be "without merit.". . .
>
> In addition to finding the claim to lack merit, the trial court must also find that plaintiffs' conduct in bringing suit was lacking in good faith.

The Court stated at page 151 that the term without merit implies boardering on frivolity and this meant "of little weight or importance having no basis in law or fact."

The factual posture of the record shows that there is ample and substantial basis in law and in fact to support the proposition that Plaintiffs claim were not without merit. The discussions found under the topic of tortious interference and slander fully demonstrated this.

The facts set forth, supra, prove the following propositions:

1. That the Defendants expressed an intent to damage the Plaintiffs.

2. That the Defendants made numerous statements to third persons to the effect that Plaintiffs were crooks, cheats and liars.

3. That the Defendants tried to take Plaintiffs' customers.

4. That the Defendants contacted numerous regulatory and governmental bodies seeking sanctions against Plaintiffs, all of the which were found to be without merit as no sanctions were sought or enforced.

5. That Plaintiffs sales substantially decreased commencing at a time when the slander started and substantially increased immediately after the issuance of the injunction.

Under these circumstances it cannot be said that the Plaintiffs case was without basis in law or fact.

In Cady, this court adopted the Warlington definition of good faith as:

> (1) An honest belief in the propriety of the activites in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activites in question will, [sic] hinder, delay or defraud others.

This court held in Cady, that an award of attorneys fees against Plaintiff under the foregoing definition was improper. Justice Howe stated at page 152:

> In the instant case, the trial court found lack of good faith because had plaintiffs researched the issue as instructed at pretrial conference, they would have discovered they had not vaild claim and they could have saved the court valuable time by avoiding trial.
>
> We disagree that their conduct constitutes bad faith. Plaintiffs were clearly pursuing a meritless claim and better preparation might well have disclosed that to them. However, that conduct does not rise to lack of

good faith. The evidence must also affirmatively establish a lack of at least one of the three elements of good faith heretofore discussed.

In this case Plaintiffs-Appellants have a much stronger case than the Plaintiffs did in Cady and there is no evidence whatsoever to affirmatively establish a lack of at least one of the three elements of the Cady definition.

ARGUMENT

THE LOWER COURT ERRED IN DISMISSING PLAINTIFFS FIRST CAUSE OF ACTION FOR TORTIOUS INTERFERENCE, WITHOUT HEARING ALL EVIDENCE IN ORDER TO MAKE FACTUAL FINDINGS.

The lower court dismissed Plaintiffs' case at the conclusion of its evidence. It is fundamental that before a dismissal should be ordered the lower court must consider the contentions of Plaintiffs in a light most favorable to them and should resolve any doubts as to that right of recovery by permitting full trial. Reliable Furniture Co. v Fidelity & Guaranty Ins. Co., 398 P.2d 685 (Utah 1965). A motion to dismiss for insufficiency of evidence which is made at the close of Plaintiff's case admits the truth of evidence and all reasonable inferences arising therefrom and the court must consider such evidence most strongly in favor of the Plaintiff and against the defendant. Asotin County Court District v Clarkston Community Corp., 436 P.2d 470 (Wash. 1968).

A dismissal on a motion at the conclusion of Plaintiffs' case is indistinguishable in operation and effect from a motion for a directed verdict where a jury is present. Christensen v

Stuchlik, 427 P.2d 278 (Ida 1967). This Court has on many occasions stated that in reviewing a motion for a directed verdict the trial court may not waive the evidence but must consider the evidence in the light most favorable to the party against whom the motion is directed. Cruz v Montoya, 660 P.2d 723 (Utah 1983).

In determining whether Plaintiff's evidence is sufficient to withstand a motion to dismiss, a trial court may not weigh the evidence or consider credibility of witnesses but the evidence most favorable to the Plaintiff must be accepted as true and conflicting evidence must be completely disregarded. Campbell v General Motors Corp., 649 P.2d 224 (Cal. 1982).

Applying these basic fundamental rules of review shows that the lower Court erred in dismissing Plaintiffs' case. The testimony introduced by Plaintiffs for their first cause of action, Tortious Interference, was in total compliance with the guidelines set forth in the Utah Supreme Court case of Leigh Furniture and Carpet Co., v Isom, 657 P.2d 293 (Ut. 1982), whereby the Utah Supreme court recognized a common law cause of action for "intentional interference with prospective economic relations". In that case, the court indicated that a prima facia cause of action for tortious interference would lie if the Plaintiff could show "(1) that the Defendant intentionally interfered with the Plaintiff's existing or potential economic relations; (2) for an improper purpose or by improper means; (3) causing injury to the Plaintiff." All of these points were demonstrated by the Plaintiffs in trial as evidenced on the

record of the transcript of proceedings in the lower Court and are set forth within this appellant brief by the nature of the Statement of the Facts.

In the Leigh Funiture case, the court elaborated on the subject of improper means. In its discussion of improper purpose it noted that:

> ...[i]n the rough and tumble of the marketplace, competitors inevitably damage one another in the stuggle for personal advantage. The laws offer no remedy for those damages---even if they are intentional--because they are an inevitable byproduct of competition. Problems inherent in proving motivation or purpose make it prudent for commerical conduct to be regulated for the most part by the improper means alternative, which typically requires only a showing of particular conduct.
>
> The alternative or improper purpose will be satisfied where it can be shown that the actor's predominant purpose was to injure the plaintiff.

Leigh Furniture 657 P.2d at 307.

The subjective intent of a person is difficult to discern and even more difficult to prove. Still in this case, there is ample evidence that the Defendants intended to damage the Plaintiffs' business relations for the sole purpose of doing harm and injury to the Plaintiffs and not out of an intent to obtain competitive advantage in business affairs.

Some of the acts of the Defendants showing their malice, ill will, and improper purpose toward the Plantiffs are set forth in this appellant brief Statements of Facts Section.

Even if it cannot be proved that the Defendants' purpose was to harm and injure the Plaintiff rather than to obtain a competitive business advantage, the Plaintiffs may

still recover by showing that the Defendants used improper means to interfere with the Plaintiffs' business relations:

> The alternative requirement of improper means is satisfied where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Such acts are illegal or tortious in themselves and hence interference.

Leigh Furniture, 657 P2d at 308 (Citations omitted). The court went on to give some specific examples of things that would be considered "improper" and said, quoting Top Service Body Shop, Inc., vs. Allstate Insurance Co., 582 P.2d 1365 (Or. 1978), "Commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, briber, unfounded litigation, defamation, or disparaging falsehood." Leigh Funriture, 657 P.2d at 308 (Emphasis added).

There is ample evidence demonstrated in the Statement of Facts to support a finding by the trier of fact that the improper means employed by the Defendants included threats or other intimidation, misrepresentation, defamation and disparaging falsehood. It is therefore clear that the second requirement of a cause of action for tortious interference is shown, if not by the Defendants' malice as improper purpose, at least by the Defendants' use of improper means.

The Plaintiffs have suffered damage which is unequivical and supported by substantial documentary evidence (see Statement of Facts). Certainly, there is no question that the Plaintiffs can show that they have been damaged by the Defendant.

ARGUMENT

THE LOWER COURT ERRED IN DISMISSING PLAINTIFF'S SECOND THROUGH FOURTH CAUSES OF ACTION FOR SLANDER WITHOUT RECOGNIZING THE ABUNDANCE OF EVIDENCE PRESENTED IN TRIAL AND IN PRE-TRIAL DISCOVERY.

Utah recognizes slander per se where the Defendant defames an individual using words that, among other things, charge "criminal conduct" or charge "conduct that is incompatible with the exercise of a lawful business, trade, profession, or office." Allred vs. Cook, 590 P.2d 318, 320 (Ut. 1979). When slander per se is established, harm is presumed. Prince vs. Peterson, 538 P.2d 1325, 1328 (Ut. 1975). While some states have adopted the negligence standard established in Gertz vs. Robert Welch, Inc., 418 U.S. 323 (1974) in all cases, Utah has never abandoned the common-law application of strict liability for defamation in a case involving a non-media Defendant and a private Plaintiff. There is no requirement of showing malice or that the Defendant's intended to defame the Plaintiffs. The Plaintiffs are entitled to recover proved damages upon showing that the Defendants libeled them and that the Plaintiffs suffered an injury thereby. General or presumed damages and punitive damages may be recovered by the Plaintiff by showing actual malice on the part of the Defendant. Allred, 590 P.2d at 322, 323.

The case at hand clearly falls under the rubric of slander per se. In the case of Prince vs. Peterson, 538 P.2d 1325 (Ut. 1975), the Plaintiff was attempting to sell his

business when he discovered that the Defendant was telling prospective buyers and others that the Plaintiff was crooked and dishonest in his business dealings and was cheating his own children. In a letter to a prospective buyer of the Plaintiffs' business, the Defendant called the Plaintiff a "clever crook" and

> "If words of that character are used in such a context or under such circumstances, they would reasonably be understood to come within the traditional requirement of libel or slander: that is, to hold a person up to hatred, contempt or ridicule, or to injur him in his business or vocation, they are deemed actionable per se; and the law presumes that damages will be suffered therefrom." Prince, 528 P.2d at 1328.

In the present case, the Defendants have called the Plaintiffs "crooks, cheats and liars" and have opened them up to hatred, contempt and ridicule in a way that has injured the Plaintiffs in their business and vocations. (See Statement of Facts.

All of these statements are actionable in and of themselves, nothing else needs to be shown except that these words were spoken and the Plaintiffs suffered an injury as a result of them. If there is any question as to whether or not these statements are defamtory, the Plaintiff is entitled to have a jury decide:

> Only when the Court can say that the language is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense, that the Court can rule as a matter of law that it is not defamatory." Atlas Sewing Centers, Inc., vs. National Association, Etc., 260 F.2d 803 (10th Cir. 1958).

Clearly, however, the evidence goes beyond the bare minimum requirements for actionable slander. There is no more

than sufficient evidence from which the trier of fact could find that the statements were motivated by malice and ill will, as such the Plaintiffs are entitled to general damages and puntive damages.

The Defendants claim that there is a privilege based on the First Amendment to make defamatory statements to public officials and cite Sierra Club v. Butz, 349 F.Supp. 934 (N.D. Cal. 1972) as authority for this proposition. The Sierra Club case is inapposite. The holding in that case was simply that a Plaintiff injured by a change in the government's policy effected by legitimate efforts on the part of the Defendant could not maintain an action for damages resulting from that change in policy. This is nothing in the Sierra Club case which indicates that the Defendants defamed the Plaintiff and were not held liable for that defamation. The privilege of petitioning the government for redress does not carry with it the unfettered right to make false and damaging statements about a private party. To follow the Defendant's argument to its logical extreme would allow a person to use government channels to malign and injure a fellow citizen by falsehood and slander with absolute impunity. The Defendant's agrument suggests that the libel and slander are permissible if the recipient is government official.

The Defendants also claim that their statements were conditionally privileged because they shared a common interest with the buyers and prospective buyers. The case of Combes v. Montgomery Ward & Co., 228 P.2d 272 (Ut. 1951) explains Utah's

doctrine of conditional privilege. In that case the Utah Supreme Court cited with approval the of Hales v. Commerical Bank of Spanish Fork, 197 P2d 910 (Ut. 1948) which adopted the Restatement of Torts Sec. 594:

> An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The Court went on to explain that the requirement was "for the purpose of safeguarding against too wide-spread, careless or ill-advised inquiry under the protection of the cloak of conditional privilege..." Combes, 228 P.2d at 275.

So something more than good faith and an interest in common with the other is required for a conditional privilege to attach. It is required that the publisher have a protectable interest and that the recipient be able, somehow, to aid in protecting that interest. In order for the Defendant to claim conditional privilege they must show that they had an interest in the matter which they correctly or reasonably believed could be protected by their publication of the defamatory matter. The Defendants have failed to show any such relationship with those to whom they published the defamatory statements.

While at first glance it may appear that the meeting of the owner's association of the Hideaway properties falls under the conditional privilege, in fact, those who were actively telling the other owners untruths such as that Formen Corporation and Fred Smith were unable to convey title or obtain a well

permit did not have an interest that could be protected by the publication of defamatory matter. Some of those parties such as Del Taylor and Mel parks had already received their deeds and obtained their well permits. As such, they had no interest sufficiently important to them to publish defamatory materials.

Furthermore, the statements made at the meetings were not made only to proper persons. The Utah Supreme Court in Knight v. Patterson, 436 P.2d 801, 802 (Ut. 1968), quoting 33 Am.Jur. 126 explained the doctrine of conditional privilege as follows:

> The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication to proper parties only.

Knight, 436 P.2d at 802 (Emphasis added). At these meetings were Arlon Fox, Jim Norlander and numerous others, non-owners who could in no way help the Defendant's maintain any purported interest. As such they were improper parties to receive defamatory matter under a conditional privilege.

Even if we assume, inspite of the above, that the statements made at the owner's association meetings were conditionally privileged, that would not make other defamatory statements not made at those meetings conditionally privileged. Most of the defamatory statements were made at other than association meetings.

Even if the Defendants could remedy this situation and somehow show that they were conditionally privileged in making the defamatory statements, that privilege requires that the

publication be made in good faith and only to the extent necessary. See Knight v. Patterson, 436 P.2d at 802. As already mentioned there is more than enough evidence on which a trier of fact could find that the Defendant's acts were motivated by malice and ill-will. "It is sufficient to say that qualified privilege is inconsistent with the existence of express or actual malice." Atlas Sewing Centers, Inc., 260 F.2d at 808. As such any privilege which the Defendants might be able to show is destroyed by their lack of good faith and their malice and ill-will in making the publication.

ARGUMENT

THE LOWER COURT WAS IN ERROR TO ORDER A DECREE OF REFORMATION SUCH THAT PLAINTIFFS MUST CONVEY WATER RIGHTS, WHERE DEFENDANTS CLAIM IS UNFOUNDED AND CANNOT BE SUPPORTED BY DOCUMENTATION.

The documentation does not support Defendants' claims for water rights against the Plaintiffs. On May 1, 1978, Formen Corporation and Parks Enterprises Inc. (consisting of some of the Defendants herein) entered into a joint venture agreement a copy of which is appended hereto. The joint venture agreement was entered into by and among the parties for the purpose of developing and selling recreational property known as Elkridge Ranches. Contained in section two of that joint venture agreement is the provision for water. This portion of the agreement is quoted as follows:

> Formen agrees to provide water rights to the parcels as they are sold on a as needed basis and further agrees to indeminify and hold Parks harmless from any liabilities resulting from the insufficiency of providing such water for the tract of parcel thereof.

> In the event that Formen defaults under the terms of this agreement or in the event this venture shall not be completed or terminated short of its time, Formen does hereby grant to Parks the right to assume their position in the purchase contract with Rennert wherein Parks will acquire the water rights by completing the payments of the contract, said payments not to exceed the original purchase price of $75,000.00.

In accordance with the terms and provisons of the contract as set forth herein above, in the event that the joint venture agreement is terminated Parks will have the option to purchase the water necessary for their lots.

Section IX "Termination" of the joint venture agreement sets forth the provisions as follows:

> In the event of termination of this agreement all liabilities of the joint venture shall be paid and all unsold parcels and those held in default of sales contract shall be distributed to Parks by the trustee holding title to the same. Parks shall have the right to acquire the water rights pertaining to said parcels at a price equal to Formen's cost.

According to this provision Parks was given the rights to acquire the water rights by purchasing the same from Formen at Formen's cost on all unsold parcels and those held in default at the time of any termination.

On December 31, 1980, a Memorandum of Partnership Dissolution Agreement, appended hereto, was signed by Formen Corporation and Parks Enterprises, Inc. terminating their contractual relationship and thereby effectuating the provisions set forth in the joint venture agreement pertaining to termination of the same. It was at the time of termination the Parks Enterprises, Inc. was then given the option to purchase the water rights by completing the payments of the contract as set

forth in the provisions of the joint venture agreement. Parks Enterprises has not availed itself to the remedies contained in those termination provisions in the joint venture agreement and they have not as yet offered to purchase the water rights as set forth therein. It has been the Defendants' position that these water rights should be given to them free and clear and without consideration. However, there are no contractual obligations for the Plaintiffs to convey water rights to the Defendants without payment for the same. The Defendants have referred to minutes of the meeting which was held on April 28, 1981, between Parks Enterprises and Formen Corporation. These minutes have been attested to as being an accurate and correct reflection of the meeting which took place on that date. The record of the meeting does not reflect that the water rights were an issue in that meeting and indeed the Defendants testified at the time of trial that the water rights were not discussed at the meeting as they had been covered in the joint venture agreement. In reviewing the exhibits that were submitted at time of trial which reflect the meeting held on that date it is clearly shown that the understanding by and among the parties thereto was that water rights were not an issue at that time as the issue had been covered completely and sufficiently in the termination provisions of the joint venture agreement.

At the time of the dissolution of the partnership between the parties hereto a special warranty deed was executed by the parties and issued to Parks Enterprises conveying to them certain parcels of land in Elkridge and in Hideaway Valley. This

conveyance was done pursuant to the terms and provisions of the Memorandum of Partnership Dissolution Agreement and in accordance with the termination provisions of the joint venture agreement. These deeds are dated May 25, 1982 and Janaury 13, 1981, respectively. The Special Warranty Deeds containing the property conveyed to Parks Enterprises, Inc., contain only real property and are void of any mention of water rights. This was done according to the provisions as set forth by and among the parties at the time of the dissolution of the agreement and all parties at the time conveyance were in agreement that water rights were not to be conveyed but were to be handled in accordance with the provisions of the joint venture agreement.

Therefore, the Defendants should be denied their claims for the conveyance of water rights without proper consideration to wit: payment of the contractual obligations as set forth in the termination provisions of the joint venture agreement. The documents and deeds signed by the parties hereto accurately reflect the intent of the parties in conveying only property to the land which is set forth on the respective deeds. The intent of the parties was that water would be conveyed upon puchase of the same from Plaintiffs by the Defendants. Absent showing of intent otherwise the Defendants should be denied their claim for the free and clear conveyance of water.

The foregoing contractual provisions are clear on their face and clearly indicate the intent of the parties that there would be no water conveyed but rather there would be an agreement whereby the Defendants could purchase water at Formen

Corporation's cost. That should have been the finding of the lower Court and in fact the court has no power to remake the contracts for the benefit of the party. See 17 Am. Jr. Contracts, Section 242, pages 627 & 628 quoted as follows:

> Power of the court to make or change contract for parties.
> It is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise or construction. In other words, the interpretation or construction of a contract does not include its modification or the creation of a new or different one. It must be construed and enforced according terms employed, and the court has no right to interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. A court is not at liberty to revise, modify or distort any agreement while professing to construe it, and has no right to make a different contract than that actually entered into by the parties. Courts cannot make for the parties better or more equitable agreements then they themselves have been satisfied to make, or rewrite contracts because they operate harshly or inequitably as to one of the parties, or alter them for the benefit of one party and to the detriment of the other, or, by construction, relieve one of the parties from terms which he voluntarily consented to or impose on him those which he did not.

ARGUMENT

THE LOWER COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON THE CROSSCLAIMS OF DEFENDANTS BRYCE AVERILL, HARRY KEITH HUFFAKER, ELZA HUFFAKER, THOMAS GENE REID AND MARY REID AGAINST FORMEN CORPORATION, FOR A REFUND OF MONIES PAID TO FORMEN CORPORATION, WHERE SUCH CLAIMS WERE IN VIOLATION OF THE STATUTES OF LIMITATIONS, IN IMPROPER JURISDICTION FOR THIS COURT TO RULE, AND WHERE THERE EXISTS GENUINE ISSUES OF MATERIAL FACT.

Under Rule 56 of the Utah Rules of Civil Procedure, a party is entitled to Summary Judgment if, among other things,

there is no issue of material fact. This rule was confirmed by the Utah Supreme Court in the case of Frederick May & Company v. Dunn, 368 P.2d 266 (Utah 1962). In this case the Court stated:

> To sustain a summary judgment, the pleadings, evidence, admissions and inferences therefrom, viewed most favorably to the loser, must show that there is no genuine issue of material fact, and that the winner is entitled to a judgment as a matter of law. Such showing must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial.

The basis of Foreclosure Defendants' Fourth Cause of Action for Summary Judgment was a simple two (2) sentence assumption that Plaintiffs were (1) in violation of federal interstate land sale laws and (2) that Defendants' were therefore entitled to a refund of all monies paid to Formen Corporation.

As in exhibit to Defendants memorandum of points and authorities in support of motion for summary judgment on cross-claim of foreclosure Defendants, Defendants included a copy of the Interstate Land Sales Act. Section 1420 of the Interstate Land Sales Disclosure Act provides that the State Court shall have jurisdiction. There is a question of fact therefore as to whether the Sixth Judicial District Court, in and for Sanpete County, had the authority to rule upon this motion for summary judgment.

The Defendants memorandum points out the fact that the Formen Corporation agreed to allow purchasers who purchased prior to April 9, 1982, to rescind their contracts if request to do so was made within two years after the date of purchase.

Defendants Reids and Averill complied with this agreement, requesting contract revision in accordance with the two year provision. Defendants Huffakers did not comply with this agreement as acknowledged in Defendants memorandum. This clearly present a genuine issue of fact upon which the Court should rule, denying summary judgment to Cross-Claim Defendants Harry Huffaker and Elza Huffaker.

Upon full examination of Defendants points and the Interstate Land Sales Act, it is now Plaintiffs' position to hereby stipulate to an obligation to reimburse Defendants Thomas Gene Reid, Mary Reid, and Bryce Averill, and accordingly, Plaintiffs hereby authorize payment to Defendants Reids and Averill by and through a release of funds that are in escrow.

Defendants memorandum raised an additional issue of fact in reference to Utah Code Annotated 57-11-17 (as inacted 1973) which provides that a purchaser is entitled to rescission and refund of all monies paid where the developer has made an untrue statement. There is clearly an issue of fact as to whether developers made an untrue statement. This issue should have been tried and not ruled on in a motion for summary judgment as to Defendants Huffakers.

There is a question of fact as to the Courts decision allowing rescission under the state act which had a longer statute of limitation than the federal act, but under that act there had to be the finding of an untrue statement. Under the federal act if the Defendants were not delivered a copy of the statement within two years they would have the right to rescission.

The disputed facts as to jurisdiction, the statute of limitations, the rescission agreement, and the validity of Plaintiffs' statement are issues to be tried rather than ruled upon in a motion for summary judgment.

ARGUMENT

> THE LOWER COURT ERRED IN DISMISSING PLAINTIFFS FIFTH CAUSE OF ACTION FOR NEGLIGENCE AGAINST MEL PARKS, AND IN DISMISSING PLAINTIFFS' SIXTH CAUSE OF ACTION FOR ANTITRUST VIOLATIONS WHERE THE LOWER COURT BARRED THE PLAINTIFFS FROM OBTAINING PERTINENT INFORMATION AND DEVELOPING THE CASE IN PRE-TRIAL DISCOVERY BY EVIDENTIARY RULINGS AT THE TIME OF DEPOSITION BEFORE THE COURT, NOTWITHSTANDING THE VOLUMINOUS EVIDENCE WHICH WAS PRESENTED AT TRIAL IN SUPPORT OF PLAINTIFFS' CLAIMS.

Defamation when combined with a joint effort to effectuate an anti-competitive effort constitutes a violation of Utah State Antitrust Laws.

The Plaintiffs claim that the Defendants have violated the Utah Antitrust Laws by restraining trade under Utah Code Annotated 76-10-914, quoted as follows:

> Illegal anticompetitive activities. (1) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal.

The foregoing is a criminal statute, but the "Utah Antitrust Act" also provides for a civil remedy under the foregoing section. That remedy is provided to Plaintiffs under Utah Code Annotated 76-10-919(1) as follows:

> Persons and governmental entities may bring action for injunctive relief or damages - Treble damages - costs. (1) A person, including the state or any of its political subdivisions or agencies, who is injured or is

> threatened with injury in his business or property by a violation of this act, may bring an action for appropriate injunctive relief and damages and the Court shall, subject to the provision of subsection(3), in addition to granting any appropriate temporary, preliminary or permanent injunctive relief, award three times the amount of damages sustained, plus the costs of suit and a reasonable attorney's fee.

Federal cases under the Federal Antitrust laws should be used in interpreting Utah Antitrust laws, Utah Code Annotated, 76-10-926, quoted as follows:

> Interpretation of act. The legislature intends that the Courts, in construing this Act, will be guided by interpretation given by the Federal Courts to comparable Federal Antitrust Statutes and by other state Courts to comparable state antitrust statutes.

The comparable federal statutes to Utah Code Annotated 76-10-914 and 76-10-919 (1) are Section 1 of the Sherman Act and Section 4 of the Clayton Act.

Section 1 of the Sherman Act (15 USC Section 15) provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nation, is duly declared to be illegal . . .

Section 4 of the Clayton Act (15 USC Section 14) is as follows:

> (a) except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the Antitrust Laws may sue therefore in any District Court of the United States in the district in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonble attorneys fees . . .

Therefore, under the foregoing Statute, Section 1 of the Sherman Act and Section 4 of the Clayton Act, a federal

remedy is provided which is the same as the Utah Code Provisions providing for remedies to companies and individuals under 76-10-914 and 76-10-919 (1).

Cases interpreting these federal sections are therefore governing under the Utah Act by virtue of Utah Code Annotated 76-10-962. Numerous federal cases have interpreted whether or not slanderous statements can constitute antitrust violations when aimed by one competitor at another. The prevailing view is that this type of conduct does violate Section 1 of the Sherman Act and it would therefore violate the comparable Utah provisions. One such case is Atlas Sewing Centers, Inc. vs. National Assocation of Independent Sewing Machine Dealers, et al., a 9th circuit case decided in 1958, 260 F.2d 803, 1958 Trade cases, paragraph 69, 180 which was decided by the 10th Circuit on Appeal from the United States District Court for the District of Utah. The Plaintiff sewing machine dealer who was new to the area sued the Trade Association for printing an article in its magazine claiming: (1) that the article was defamatory; and (2) that the article as published was an antitrust violation in that it was an attempt to restrain trade. The lower court granted summary judgment in favor of the Defendants and the Plaintiffs appealed. The 10th Circuit before Chief Judge Bratton and Judges Phillips and Lewis reversed, stating that the Complaint did set forth a cause of action and that the article on its face presented a prima facia slander, and introduced sufficient facts to prevent summary judgment being granted on the antitrust claim. The article is quoted as follows:

'You will probably receive a lot of complaints after we open up business here', T. C. Kaplan executive vice president, Atlas Sewing Centers, Inc., told Hendrich Romeyn, Business Men's Alliance (Better Business Bureau) in his Salt Lake City office yesterday.

Mr. Kaplan called at his office, Mr. Romeyn said to try to impress him with the bigness and strength of Atlas.

'He showed me a printed prospectus on the financial standing of this corporation he represents. I am a man of considerable experience in stocks and bonds, and I read the report from beginning to end several times, but I'll be darned if I could find who owned what, and what who owned if they owned it. Many prominent names are used, which naturally impressed me, but their actual connection is left very vague', Mr. Romeyn said.

'As to Mr. Kaplan's warning that my office will likely receive many calls from his customers, this of course only made me wonder why. If a man calls the police department and says he is going to shoot his wife, this does not make the crime any less serious when it happens.

'Regardless of all those fancy names and nine-digited figures in his prospectus, this office will treat complaints against them on their own merits.

'At this point we have no information, except his own, that we may expect trouble, and until we do, we will assume that Atlas will, if it opens up here as he says, operate under the rules of free enterprise and under good business judgment', Mr. Romeyn concluded.

The general supporting allegations in this case are identical to those asserted by the Plaintiff Formen Corporation.

The Court states at page 805:

> The Association Davies and the other named Defendants' through collaboration, cooperation and conspiracy have entered into a plan or scheme to unreasonably restrict and restrain the business of pursuing and selling sewing machines in interstate commerce by a program of publishing faults and defamatory information about 'Atlas and its "products" to induce Atlas' suppliers and customers not to deal with it for the unlawful purpose of eliminating Atlas' competition in the purchase and sale of sewing machines in interstate commerce.

The Court found that this allegation properly set forth a cause of action under Section 1 of the Sherman Act to the same effect as United States vs. Central Code Apron and Linen Service, 1952, 1953 Trade Cases, paragraphs 67, 394, Forgett vs. Shaff, 1950, 1951 Trade Cases, paragraph 62, 610, Forgett vs. Shaff, 3rd Circuit Court of Appeals, 1950-1951 Trade Cases, paragraph 62,000, 610, 181 F.2d 754.

The Defendants' repeated attempts to influence governmental agencies and bodies against the Plaintiffs and to induce action against them constitute violations of the Utah Antitrust Laws.

The Defendants have made a concerted effort to engender complaints to various governmental agencies and have succeeded in those efforts in that complaints have been made to the following governmental agencies by the Defendants and by other parties motivated by the Defendants:

1. The Sanpete County Commission.
2. The Sanpete County Attorney's Office.
3. The Utah State Natural Resource Department, Water Resource Divisions and Water Rights Division.
4. The Federal Department of Housing and Urban Development.
5. The Utah State Sanitation Department.
6. The Utah Business Regulations Department.

Those contacts are supported by the fact statements heretofore set forth in this appellant brief.

Fred Smith has explained in his Affidavit the tremendous harrassment that has occurred on the part of the

Defendants and has confirmed the fact that he has spent over $20,000.00 in legal expenses in meeting those objections.

The leading case in this area is California Transport vs. Trucking Unlimited, (U.S. Supreme Court, 1972) 92 S.Ct. 609, 404 U.S. 508.

The summary of this case by the Court at page 642 provides as follows:

> The Complaint in a civil suit, instituted under Section 4 of the Clayton Act in the United States District Court for the Northern District of California, alleged that the Defendant highway carrier had conspired to put the planitiff highway carrier out of business as competitors by instituting action in state and federal proceedings to resist and defeat the plaintiff's applications concerning operating rights, and that the defendants had combined to deter the plaintiff's from having 'free and unlimited access' to the agencies and courts and to defeat such right by massive concerted and purposeful activities of the Complaint for failure to state a cause of action (1967 Trade Cases, Section 72,298), but the United States Court of Appeals for the Ninth Circuit reversed. (432 F.2d 755).
>
> On certiorari, the United States Supreme Court affirmed the Court of Appeals judgment and remanded the case for trial. In an opinion by Douglas, J., expressing the view of five members of the Court, it was held that: (1) although highway carriers, as part of the right of petition protected by the First Amendment, had the right to access to agencies and courts to be heard on applications sought by competitive highway carriers, nevertheless they were not necessarily thereby given immunity from the antitrust laws and (2) a violation of the antitrust laws would be established in the case at bar if the plaintiffs' allegations were proved as facts, particularly the allegations that the defendants, through massive, concerted, and purposeful group activites, had combined to deter the plaintiffs from having "free and unlimited access" to the agencies and courts, it being material whether the means used by the defendants might have been unlawful.

Defendants claim that they had the unrestricted right to en mass contact all the governmental agencies which are

heretofore enumerated. In Trucking Unlimited, Justice Douglas refutes such a notion in the following language at page 647:

> Petitioners rely on our statment in Pennington that 'nor shields from the Sherman Act a conserted effort to influence public officials regardless of intent or purpose. 381 U.S., at 670, 14 L Ed. 2d at 636.
>
> In the present case however, the allegations are not that the conspirators sought 'to influence public officials' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp the decision making process. It is alleged that petitioners 'instituted the proceedings with actions . . . with or without probable cause, and regardless of the merits of the case'. The nature of the views pressed does not of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access of the agencies and courts.

The actions of the Defendants in this case in bombarding governmental agencies and trying to influence them to withdraw approval from the subdivision, particularly efforts to cause Utah County, HUD and the Utah Department of Business Regulations to do so, are precisely those kinds of actions which in Trucking Unlimited were found to be violative of the Utah Antitrust laws as heretofore set forth.

Mr. Howard argues on behalf of the Defendants that they had a constitutional privilege to so approach the governmental agencies and that all such communication was in fact privileged and any construction of contrary laws would render them unconstitutional. Those precise arguments were made by Counsel in the Trucking Unlimited case and were promptly rejected by the Court at page 648 stating:

> It is well settled that First Amendments rights are not immunized from regulation when they are used as an intrical part of conduct which violates a valid Statute. Giboney vs. Empire Storage Company, 336 U.S. 490 93 L Ed., 834, 69 Sup. Ct. 684. In that case Missouri enacted a Statute banning secondary boycotts and we sustained an injunction against picketing to enforce a boycott saying:
>
> It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing but it has never been deemed an inbridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part inititated, evidence, or carried out by means of language, either spoken, written, or printed . . .
>
> Such an expansive interpretation of the Constitutional guarantees of speech and press would make it partically impossible ever to enforce laws against agreements in restraintive trade as well as many other agreements and conspiracies deemed injurious to society. (336 U.S., at 502, 93 L Ed. at 843.)
>
> In Associated Press vs. United States, 326 U.S. 1, 89 L ed., 2013, 65 Sup. Ct. 1416, we held that the Associated Press was not immune from the antitrust laws by reason of the fact that the press is under the shelter of the First Amendment.

In this case the Defendants in their ongoing attempt to be over precise may argue that there is a distinction between preventing access to a governmental agency and an attempt to initiate action through those agencies. That the holding of Trucking Unlimited is broader than merely those situations in which the Defendant interferes with application is made clear on page 648 in the following language of Justice Douglas:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial process and which may result in antitrust violations misrepresentations, condoned in the political arena are not immunized when used in the adjudicatory process. Apponents before agencies or courts often think poorly of the others tactics, motions or defenses and may readily call them baseless. One claim which a court or agency may think baseless may go unnoticed

> that a pattern of baseless, repetitive claim may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of these processes produced an illegal result, effectively barring respondents from access to the agencies and courts. Insofar as the adminstrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'"

Trucking Unlimited has spanned a large progeny of cases which clearly enforces the notion that a concerted effort by a group of individuals to impose upon a competitor through an abuse of administrative and/or judicial processes is inappropriate and violative of the antitrust laws.

ARGUMENT

THE LOWER COURT ERRED IN EVIDENTIARY RULINGS WHICH WHERE PREJUDICIAL WHERE NUMEROUS OBJECTIONS BY DEFENSE COUNSEL WERE SUSTAINED AND LIKE OBJECTIONS BY PLAINTIFFS' COUNSEL WERE OVERRULED; WHERE RELEVANT TESTIMONY IN SUPPORT OF PLAINTIFFS' CLAIMS WAS NOT ALLOWED TO BE HEARD; WHERE DEFENSE COUNSEL WAS ALLOWED TO TESTIFY AS AN ADVOCATE FOR THE DEFENSE POSTURE CONTRARY TO THE PROVISIONS OF THE CANON OF ETHICS; AND WHERE THE VERY NATURE AND NUMBER OF THESE RULINGS AND COMMENTARY OF THE COURT FAVORED THE DEFENSE, DEMONSTRATING BIAS AND PREJUDICIAL COURT RULINGS.

Rule 45 of the Utah Rules of Evidence states that the judge may in his discretion exclude evidence if he finds that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

In the instant case the judge repeatedly excluded evidence from testimony but not apparently due to any of the three (3) reasons listed above.

The Utah Rules of Civil Procedure, Rule 43 Evidence (c), provides that if an objection to a question propounded to a witness is sustained by the Court, an examining attorney may make a special offer of what he expects to prove by the answer of the witness. The Court upon request shall take and report the evidence in full, unless it clearly appears the evidence is not admissible on any grounds or that the witness is privileged.

In the instant case testimony of the Sanpete County attorney was not allowed in Court, notwithstanding the proffer of testimony by Plaintiffs' counsel, indicating the relevancy and importance of such testimony. Even though it is clear that such testimony would contradict the Defense posture, such testimony should have, on the grounds called for by Plaintiffs' counsel, been allowed in the trial hearing.

The Utah Rules of Evidence provide in section (b) for the scope of cross-examination such that defense counsel could subsequently interrogate him by leading questions without being bound by his testimony and make contradictions and impeach him in all respects, and the witness, thus called may be contradicted and impeached by or on behalf of the adverse party. Wherefore, cross-examination upon the subject matter of his examination in chief should be adequate descents to any facts or and truth obtained through Plaintiffs questioning and subsequent testimony for the record. It is essential that revelant testimony be

allowed in a Court of law for the purpose of defining and illustrating Plaintiffs' case.

In the instant case the testimony of Ross Blackham was not allowed. Plaintiffs considered Mr. Blackham to be an expert witness in this case with testimony relevant and vital to Plaintiffs' case.

> THE COURT: His opinion has not legal weight at all. It has no legal weight in this court and it has no legal weight -- and it has no more weight than any attorney that goes down there or any individual that goes down there. (Tr. Vol. II, Page 472,lines 7 through 11).

Whether or not Mr. Blackham was an expert, his testimony in the form of an opinion should have been admissible under Rule 56:

> (1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

Clearly Plaintiffs' sought testimony from Mr. Blackham in order to determine important facts in issue. Mr. Summerhays explained the relvlancy of proffered testimony as follows:

> MR. SUMMERHAYS: They're claiming or we're claiming that they called us crooks, cheats, and liars and that the subdivision was illegally registered . . . (Tr. Vol II, Page 469, lines 16 through 18).

> MR. SUMMERHAYS: Now, I think, now, I think truth is a defense that they're trying to raise and we're trying to share the elements of our disparagment. One is that they said were illegally registered. That was not because we were properly registered and it was improper to accuse us of that which would have been a criminal violation of the local statute and so I'm just trying to get out whether we were properly registered. That's all

I'm trying to find out. (Tr. Vol. II., page 469, lines 24 though Page 470, line 7)

In spite of the fact that the Defense counsel continued to argue the inadmissibility of the testimony and Plaintiffs' counsel offered further explanations as to the revelancy of said testimony, the Court ultimately found that the admission of this testimony was not relevant to Plaintiffs' case and that the basic foundation for questioning was wrong in that, it is not a criminal offense being discussed. Mr. Summerhays explained how a criminal offense was worthy of consideration as follows:

> MR. SUMMERHAYS: They accuse my client of a criminal offense, they say you committed something that is a criminal crime and then they defame him unless they are true, unless it's a true statement, so I'm trying to find our whether that was a true statement or not, Your Honor, and this man is the best man to tell us. Tr. Vol. II, Page 474, lines 17 through 22.
>
> MR. HOWARD: Objection, irrevelant and immaterial, why they did or didn't. Tr. Vol. II, Page 479, lines 4 through 6.
>
> THE COURT: Objection's sustained.

Whereupon the witness was excused and Mr. Blackham, who was qualified to given an opinion as to the violation of the ordinance, was not allowed to testify. That testimony was important to show that Formen Corporation had not violated the statute in connection with that subdivision. Conversely, the testimony of Mr. Don Skipworth, in response to Defense questioning aimed at showing said violation was allowed; where at Mr. Skipworth, a Formen Corporation officer was not qualified as was Mr. Blackham,to testify upon the issued involved. The Plaintiffs consequently were not allowed fair representation and good faith questioning to define and exempilfy their position.

CONCLUSION

Based upon the foregoing presentation of facts and law Plaintiffs appeal now to the Supreme Court of the State of Utah for a reversal of the lower Court's Judgment awarding Attorneys Fees to Defendants. Plaintiffs have spent an abundance of time, effort, and money in the belief that they were entitled to relief as sought in their pleadings. The proceedings were instituted in this matter with good faith, and with the belief that Plaintiffs were damaged by the wrongdoings of the Defendants. Plaintiffs pursued their claims with diligence and determination in an earnest endeavor to recover from loss and to achieve protection of the law from any damaging actions that may occur in the future.

The Defendants have not proven their allegation that the action was brought in "bad faith". Upon the preponderance of evidence presented for review it is obvious that Plaintiffs' claim is supported such that the Defendants have not proven the case was "without merit". The Defendants have failed to prove that the claims of the Plaintiffs were "of little weight or importance having no basis in law or fact". In fact, the claims as presented by the Plaintiffs and demonstrated within this appellant brief are based on facts presented at the trial by numerous witnesses. The Defendants failed to prove that Plaintiffs were wrong in initiating and pursuing this litigation. Plaintiffs conscientiously sought relief within the provisions of the law and in the interest of justice.

The State of Utah recognizes the common-law cause of action of Intentional Interference with Prospective Economic Relations. A prima facia cause of action is made out for that tort by showing that the Defendants intentionally interfered with the Plaintiffs' exisiting or prospective economic relations, that the Defendants were motivated by an improper purpose or used improper means, and that the Plaintiffs suffered an injury as a result of the Defendants' acts. In the present case, there are more than sufficient facts for a trier of fact to conclude that each of these requirements has been met. Therefore, Defendants' Motion to Dismiss this case for the First Cause of Action - Tortious Interference was inappropriate and should not have been granted.

Utah recognizes the doctrine of slander per se in cases such as this one where the Plaintiffs are charged with criminal misconduct or conduct not consistent with the operation of a lawful business. The Plaintiffs need not show that the Defendants intended to defame them in order to recover. Because there is evidence on which a trier of fact could base a finding of malice on the part of the Defendants, the Plaintiffs may be entitled to general and punitive damages as well as proved special damages.

The Defendants claim of right to slander the Plaintiffs where the recipient of the defamatory matter is a government agency or official is not supported by authority.

Defense Attorney Jackson Howard said in his opening remarks that:

> . . .Mr. Smith is a peculiar man and we think that evidence will demonstrate to show you he's combination meglamaniac, paranoid, schizophrenic. He does these kinds of things. He gets very, very sensitive. He develops an imaginary peak from what he thinks are perceived wrongs that others commit and, therefore, he gets very, very offended . . .
>
> (Tr. Vol. I, page 42, lines 9 through 16)

However, the Defense presentation did not elaborate upon or prove the allegations of the above statement, and was in and of itself slanderous in nature.

The doctrine of conditional privilege does not apply in this case because the Defendants have no legitimate interest which publication of defamatory matter to others would correctly or reasonably help them defend or maintain. Even if a conditional privilege could be found, it would have been violated by the Defendants failure to act in good faith and without malice.

Therefore, the Plaintiffs have ample grounds on which to make a claim for slander and the Defendants' Motion to Dismiss this case for the Second through Fourth Causes of Action was inappropriate and should not have been granted.

Plaintiffs hereby appeal to the Utah Supreme Court for a reversal of the lower Court's award for reformation such that Defendants would be provided water notwithstanding the terms of the agreements previously set forth by both parties to this action. Defendants have not provided documentation in support of their claims for water rights. The contractual provisions are clear in the signed agreements which were drawn to set forth terms and arrangements whereby water would be available for all

parties concerned at any given time by means of the execution of the contractual agreements. Plaintiffs are previously obligated for the payment of said water rights. The facts and law set forth in this appellant brief clearly demonstrate Plaintiffs' position in this regard. The intent of the parties of both parts was that water would be conveyed upon purchase of the same from Plaintiffs by the Defendants. Absent a showing of intent to the contrary, the Defendants should not have been granted reformation for free and clear conveyance of water. Accordingly, Plaintiffs seek a reversal of this decision of the lower Court.

Jurisdiction of the lower Court is questioned in appeal to the Supreme Court for a decision as to the lower Court's authority to rule upon a motion brought on the merits of an agreement with the Federal Office of Interstate Land Sales. Concurrently there is a matter of fact as to whether Defendants' crossclaims were intitiated in violation of the Statute of Limitations.

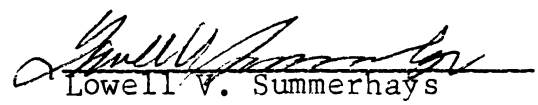
Certainly the questions concerning the rescission agreement entered into by Formen Corporation and the authenticity of Formen's offering statement are questions of fact and of law which should have been heard at trial rather than ruled on in a pre-trial motion for summary judgment.

The Plaintiffs seek a reversal of the lower Court's decision to dismiss the cause of action for Antitrust Violations on the basis of facts and law rendered within this appellant brief. Although Plaintiffs were prevented from conducting thorough discovery on the subject due to Court rulings, there is

sufficient evidence and appropriate law to warrant a review of this issue. The actions of the Defendant did, in fact, restrain the trade of the Plaintiff; and the actions of the Defendants constituted a contract, combination or conspiracy in restraint of trade and commerce of the Plaintiffs, which is in violation of Utah Code Annotated 76-10-914, and which entitled Plaintiffs to bring action under 76-10-919 of the Utah Code Annotated for damages resulting from the illegal and wrongful actions of the Defendants as heretofore set forth.

It is a fundamental doctrine of the law that a party to be affected by a personal judgment must have a day in Court or opportunity to be heard (46 Am Jur 2d §18). There was a substantial amount of evidence as proffered by Plaintiffs' counsel to the Court and as indicated in the substance of the expected evidence by questions indicating the desired answers, which lines of questioning were repeatedly objected to by Defense Counsel and sustained by the Court, such that Plaintiffs were unable to enter supportive and factual testimony to the record which would verify and substantiate Plaintiffs' claims. The Plaintiffs' opinion is that the erroneous exclusion of evidence in both pretrail discovery and in Court during the trial resulted in the exclusion of evidence which would have had significant influence in bringing about a different finding.

Respectfully submitted.



Lowell V. Summerhays

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Appellant to Leslie W. Slaugh and Jackson Howard, Howard, Lewis & Petersen, 120 East 300 North, Provo, Utah 84603 this 20th day of June 1985.

Lowell V. Summerhays

ADDENDUM

Plaintiffs' Exhibit #35 "More Fireworks" Letter and

"Fireworks" Letters

Order Awarding Reformation and Attorney Fees

Findings of Fact and Conclusions of Law

Judgment

Joint Venture Agreement

Memorandum of Partnership Dissolution Agreement

Summary Judgment on Counterclaim on Foreclosure Defendants

Exhibit "A" to plaintiffs answers to interrogatories

Hi Folks,

Tucked away in our fantastic winter wonderland, the snow, like a blanket, has made Hideaway Valley, the perfect Christmas card picture.

We have 13 families taking up permanent residence. Giving us about 19 kids. School opened the whole last week of August. Hideaway Valley has about 6 kids going to Fairview grade school, 7 going to Moroni Middle school, and 6 more attending Mt. Pleasant High School. Combined with Indianola, the bus picks up about 56 kids, making an all time high for this area.

We've had two weddings and one new baby since summer. Tom Parks married Robin Dove from San Diego, and Wendy Huffaker married Bruce Catmull from Salt Lake City. New baby Matthew belongs to Hal and Sheuna Parks.

Some of the kids from HV spent 3 days this summer on a campout at Joe's Valley with the Fairview 3rd Ward. All had a good time. Movies waterskiing, fun games, volleyball, and all the food were provided. Awards were given out for 1st, 2nd, & 3rd place in the competition games. Sunburn was not choosey about who won or lost, they all got it. Mel Parks received the Champion Pancake flipper award, and Myrt Parks received the Chief Cook and Bottle Washer award.

A few of the ladies of Hideaway and Indianola area, get together once a month to share various ideas on crafts to make for gifts and home. An abundance of darling creations have come out of these sessions. We only wish more women were here to join in the fun.

A few families joined the Fairview 3rd Ward at their Christmas Formal. Didn't recognize some, Boy how we change when we're all dressed up.

We'd like to acknowledge a special thanks to Don Charlesworth, for making it possible for everyone to get in and out when it snows. Even tho' he gets his tractor stuck, we appreciate the wear and tear on him and the tractor. We even appreciate the noise at 4 in the morning.

We also occasionally see Max Smith on the ever popular grader clearing the main road. Our thanks to him as well.

Altho the roads are snowpacked and slick at times, we do try to keep in touch with the other families.. Even if it's just to wave while picking up kids from the bus.

Christmas vacation started Dec 24th, kids are happy, mothers are looking for a cheap motel in another town, where we can get some peace and quiet. School starts again Jan. 3rd. HOORAY!

Not much else has happened out here, since winter hit. But we're looking forward to Summer when we'll see a lot of you backagain. Keep in touch.

Dear Association Member,

! FIREWORKS ! As you have probably surmised after reading the "P.S." addition to the Pat Mounteer newsletter, there is not only a lack of concensus among our trustees, but feelings have deteriorated to the point that some trustees no longer wish to serve on the same Board with each other!

Your Association President and Vice-President feel they haven't accomplished a thing while serving with the present Board - that their many trips and meetings have been a complete waste of time and money. But we, as year-round residents of Hideaway Valley, have been watching closely the activities of the Board and feel these two trustees deserve our thanks and support for seeking after the best welfare of the Association and striving to keep Association funds from being spent foolishly. We intend to let all the Association members know what has been going on in our next Association meeting. (Wait 'til you see the meeting agenda!)

Property Owners should be interested to know that when your President and Vice-President called for the Annual meeting to elect new trustees as called for in the Association By-Laws, the other 3 trustees protested the motion!

Never-the-less, please be advised that our Annual meeting as called for in the By-Laws (Section 2.1) will be held on January 27th, 1983 at 7:00 P.M. in the East Cafeteria of the Provo High School, 1125 N. University in Provo, Utah, for the express purpose of electing new trustees and informing Association members of important matters concerning Hideaway Valley. We earnestly urge all members to be in attendence to vote your preference of how <u>you want</u> your money to be spent and your ideas concerning amendments to the By-Laws. It is very important that you attend this meeting. PLEASE COME!

NOTE OF INTEREST: Much time, effort, and money has been spent by individual members at no cost to the Association - (everything from the postage costs of this newsletter to the services of an attorney concerning your rights as property owners.

Sincerely,

MR. & MRS. DEL TAYLOR	MR. & MRS. EVERETT BRITTON	MR. & MRS. FRANK PIND
" GENE REID	" LARRY ANDERSON	" BRYCE AVERILL
" HAL PARKS	" JERRY PARKS	" KEITH HUFFAKER
" TOM PARKS	STARLA PETERSON	

P.S. Trustees Mel Parks & Don Charlesworth, want you all to know that they believe the the Board was in error in voting to take away the voting right of members with unpaid assessments. They believe, as we do, that that is a matter that requires approval of the Association members ourselves.

WHETHER YOU HAVE PAID YOUR ASSESSMENT OR NOT — YOU <u>WILL</u> HAVE VOTING RIGHTS IN THE NEXT ASSOCIATION MEETING THIS JANUARY!

Exhibit "B" to Plaintiff's Answers to Interrogatories

* MORE FIREWORKS *

ICE THIS ORIGINAL LETTER WAS WRITTEN, THERE HAS BEEN MORE UNDERMINING OF YOUR RIGHTS AS
IPERTY OWNERS. THIS NOTE IS TO INFORM YOU, THAT REGARDLESS OF ANY INFORMATION YOU MAY
IEVE TO THE CONTRARY, (TRUSTEES, FRED SMITH, PAT MOUNTEER, & LAMAR MACKLIN, MAY TRY TO
CK THIS MEETING), THERE WILL BE AN ASSOCIATION MEETING HELD THIS JANURRY 27TH AS CALLED
IN THE ASSOCIATION BY-LAWS FOR THE EXPRESS PURPOSE OF ELECTING NEW TRUSTEES AND
ING YOU EXTREMELY IMPORTANT INFORMATION OF THE ASSOCIATION.
MAY HAVE RECIEVED A LETTER FROM PAT MOUNTEER, STATING THAT MEL PARKS HAS BEEN RELEASED,
FEEL YOU SHOULD KNOW THE TRUTH OF THAT MATEER AND HAVE THE RIGHT TO DETERMINE HOW THE
OCIATION IS TO BE RUN AND HOW YOUR MONEY IS TO BE SPENT.
ASE DON'T LET US DOWN — COME TO THIS MEETING AND EXERCISE YOUR VOTE AFTER HEARING ALL
FACTS.

Don Charlesworth Sr. Del Taylor

DON CHARLESWORTH, VICE-PRESIDENT DEL TAYLOR, MEMBER

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY, STATE OF UTAH

FORMEN CORPORATION, Et al,

Plaintiffs,

-vs-

MEL PARKS, Et al,

Defendants.

O R D E R

CIVIL NO. 8579

The following matters having been taken under advisement, NOW, THEREFORE, IT IS ORDERED as follows:

WATER ISSUE

The Court finds it was the purpose of the Dissolution Agreement to effect an equal division of the Joint Venture Assets. The water as well as the land was an asset and the land could not be legally conveyed to a purchaser without water.

IT IS THE ORDER OF THE COURT that Parks Enterprises, Inc., is entitled to a Decree of Reformation and that Formen Corporation shall provide water without cost to Parks Enterprises, Inc., for the lots conveyed to it under the Dissolution Agreement. The water to be provided in the same proportion as furnished with other lots heretofore sold.

ATTORNEY FEES ISSUE

This Court finds the Plaintiffs case was without merit and lacking in good faith.

The Court finds that the Plaintiffs intended by the law suit to take advantage of the Defendants and to hinder and delay the Defendants

in their investigation of their rights under the law.

The Court finds that the use of legal process in this claim for millions of dollars and excessive discovery was done to prevent the Defendants in their use of property purchased and in the legal process.

The Court finds that the legal process was used for the purpose of frightening the Defendants. Bad faith was exhibited in the filing of the Complaint and the causes of action used and in the method of prosecution.

The Court finds the Plaintiff abused the Court processes, namely the Restraining Order, Injunction and excessive Discovery.

The Court finds the Defendants, at most, undertook to make reasonable inquiries concerning their rights as property owners in Joint Venture and as subdivision owners. The Plaintiff broughtand maintained this action in bad faith to prevent Defendants inquiry and use of the Courts.

THE DEFENDANTS ARE AWARDED JUDGMENT against the Plaintiffs for Attorney fees and costs, which the Court finds reasonable, as follows:

Attorney Fees----------	$30,000.00
Office Costs----------	3,771.05
Court Costs----------	1,800.75
TOTAL COSTS	$35,571.80

The Defendants shall prepare Findings, Conclusions of Law and Decree in conformity with this Order.

Dated this 30 day of October, 1984.

DON V. TIBBS
DISTRICT JUDGE

AFFIDAVIT OF MAILING

Mailed a copy of the above and foregoing Order to the following, postage prepaid, this 30 day of October, 1984, from offices at Manti, Utah:

Jackson Howard, Attorney at Law, Offices at 120 East 300 North Delphi Building, Provo, Utah, 84603

Lowell V. Summerhays, Attorney at Law, Offices at 420 Continental Bank Building, Salt Lake City, Utah, 84101

Carole B. Mellor
Trial Court Executive

HOWARD LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P O BOX 778
PROVO UTAH 84603
TELEPHONE 373 6345

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY

STATE OF UTAH

FORMEN CORPORATION, a Utah corporation, DON SKIPWORTH, and FRED SMITH,	:	
Plaintiffs,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
VS.	:	
MEL PARKS, PARKS ENTERPRISES, INC., an Idaho corporation, NASKY JOINT VENTURE, a partnership, DEL TAYLOR, NANCY TAYLOR, his wife, LARRY ANDERSON, HAL PARKS, JERRY PARKS, STARLA PETERSON aka STARLA PARKS, BRYCE AVERILL, HARRY KEITH HUFFAKER, ELZA HUFFAKER, his wife, THOMAS GENE REID, MARY REID, his wife, WANDA HOPPER, PARKS & SONS SANITATION, INC., a Utah corporation, PARKS & SONS INTERMOUNTAIN, INC., an Idaho corporation, and JOHN DOES I through X,	:	
Defendants.	:	CIVIL NO. 8579

The plaintiffs' complaint and the defendants' counterclaims came on for trial before the above-entitled Court on August 27 through 30, 1984. The plaintiffs were present and represented by

their attorney, Lowell V. Summerhays. Defendants Mel Parks, Del Taylor, Nancy Taylor, Hal Parks, Starla Peterson (now Starla Mayers) Bryce Averill, Harry Keith Huffaker, Elza Huffaker, Thomas Gene Reid, and Mary Reid (hereinafter "defendants") were each present at various times during the trial, and the defendants were represented by their attorneys, Jackson Howard and Leslie W. Slaugh. The Court having heard the plaintiffs' evidence, and the defendants having moved at the close of plaintiffs' evidence to dismiss the action for failure to establish a prima facie case, and the Court having entertained oral arguments and being fully advised in the premises, now hereby makes and enters the following findings of fact and conclusions of law.

120 EAST 300 NORTH STREET
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PROVO UTAH 84603
TELEPHONE 373 6345

FINDINGS OF FACT

1. The parties have stipulated and agreed that the counterclaims of the defendants, with the exception of the third cause of action on behalf of Parks Enterprises, and the claim for attorney's fees pursuant to Utah Code Ann. § 78-27-56, may be dismissed without prejudice.

2. By order of this Court, dated March 27, 1984, this Court granted the defendants' motions for summary judgment with respect to (1) the causes of action against Nasky Joint Venture, (2) the causes of action against Nancy Taylor, (3) the causes of action against Jerry Parks, Starla Parks, and Wanda Hopper, and (4) the

cause of action for injunctive relief.

3. The plaintiffs have stipulated that the fifth cause of action, for negligence against Mel Parks, may be dismissed.

4. None of the defendants intentionally interfered with the performance of any existing or potential contracts to which any of the plaintiffs were parties.

5. None of the defendants intentionally interfered with the existing or potential economic relations of any of the plaintiffs.

6. None of the defendants made or uttered any defamatory statements concerning any of the plaintiffs.

7. None of the defendants acted with malice towards any of the plaintiffs.

8. There was no credible or believable evidence that any of the statements made by any of the defendants were false.

9. There was no credible or believable evidence that any of the plaintiffs had suffered any special damages proximately caused by any of the defendants.

10. There was no believable, credible and concrete evidence concerning any general damages.

11. The evidence concerning general damages was too speculative to be worthy of consideration.

12. There was no believable or credible evidence of any conspiracy between or among any of the defendants.

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13. There was no believable and credible evidence that any of the defendants committed any acts violative of the applicable anti-trust laws.

14. It was the intention of the parties to the "Memorandum of Partnership Dissolution Agreement" (hereinafter "dissolution agreement") to effect an equal division of the joint venture or partnership assets.

15. Formen Corporation had an obligation, as part of its contribution to the joint venture, to provide the water necessary for the development of the land owned by the joint venture.

16. The water as well as the land was an asset of the joint venture.

17. The land could not legally be conveyed to a purchaser without water.

18. The failure of the dissolution agreement to explicitly list water as an asset and to explicitly provide for the division of the water was due to the mutual mistake of the parties.

19. The parties to the dissolution agreement intended that Parks Enterprises, Inc., would receive, as part of its equal share of the joint venture assets and without additional or separate cost to Parks Enterprises, Inc., the water necessary for the lots received by Parks Enterprises, Inc., under the dissolution agreement, and that the water would be provided in the same proportion as had been

/////

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furnished, or had been contracted to be furnished, for other lots heretofore sold.

20. The plaintiffs' case was without merit and was lacking in good faith.

21. The plaintiffs intended by this lawsuit to take advantage of the defendants and to hinder and delay the defendants in their investigation of their rights under the law.

22. The plaintiffs' use of legal process in their claim for millions of dollars and in their excessive discovery efforts was done to prevent the defendants from enjoying the use of their property and from their use of the legal process, and constituted harassment.

23. The plaintiffs used the legal process for the purpose of frightening the defendants. Bad faith was exhibited in the filing of the complaint and the causes of action alleged and in the method of prosecution.

24. The plaintiffs abused the court processes, in obtaining the restraining order and the injunction, and through excessive discovery proceedings, and in presenting frivolous and meaningless, time consuming evidence and testimony.

25. The defendants, at most, undertook to make reasonable inquiries concerning their rights as property owners in the joint venture and as subdivision owners.

26. The plaintiffs brought and maintained this action in bad faith.

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PROVO UTAH 84603
TELEPHONE 373 6345

27. The defendants have incurred attorney's fees in excess of $30,000.00, and the sum of $30,000.00 is a reasonable attorney's fee.

28. The defendants have incurred attorney office costs in the amount of $3,771.05, which amount is reasonable.

29. The defendants have incurred pre-trial court costs in this matter in the sum of $1,800.75.

CONCLUSIONS OF LAW

1. None of the plaintiffs established a cause of action against any of the defendants for tortious interference with existing or prospective economic relations or with existing or potential contracts.

2. Formen Corporation did not establish a cause of action for slander or libel against any of the defendants.

3. Don Skipworth did not establish a cause of action for slander or libel against any of the defendants.

4. Fred Smith did not establish a cause of action for slander or libel against any of the defendants.

5. None of the plaintiffs established a cause of action against Mel Parks for negligence.

6. None of the plaintiffs established a cause of action against any of the defendants for anti-trust violations.

/////

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TELEPHONE 373 6345

7. Parks Enterprises, Inc., is entitled to a decree reforming the "Memorandum of Partnership Dissolution Agreement" to include the following paragraph:

> Formen Corporation shall provide water without cost to Parks Enterprises, Inc., for the lots conveyed to Parks Enterprises, Inc., under this agreement. The water is to be provided in the same proportion as has been furnished or has been contracted to be furnished for other lots heretofore sold.

8. In accordance with the terms of the "Memorandum of Partnership Dissolution Agreement" as understood and intended by the parties, Formen Corporation should be required to convey 69 acre-feet of domestic use water right to Parks Enterprises.

9. The defendants are entitled to judgment against all defendants, jointly and severally, for reasonable attorney's fees in the amount of $30,000.00, attorney office costs in the amount of $3,771.05, and pre-trial costs in the amount of $3,771.05, pursuant to Utah Code Ann. § 78-27-56 (Supp. 1983).

DATED this ____ day of December, 1984.

BY THE COURT:

_____
DON V. TIBBS, District Judge

/////

/////

/////

120 EAST 300 NORTH STREET
P O BOX 778
PROVO, UTAH 84603
TELEPHONE 373-6345

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 11th day of December, 1984:

Mr. Lowell B. Summerhays
Attorney for Plaintiffs
420 Continental Bank Building
Salt Lake City, UT 84111

Amy L. McClure
SECRETARY

120 EAST 300 NORTH STREET
P O BOX 778
PROVO UTAH 84603
TELEPHONE 373 6345

906

FILED
[illegible] UTAH
'84 DEC 19 AM 9 42
[illegible]
BY [illegible] DEPUTY

HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P O BOX 778
PROVO, UTAH 84603
TELEPHONE 373-6345

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY

STATE OF UTAH

FORMEN CORPORATION, a Utah corporation, DON SKIPWORTH, and FRED SMITH,

Plaintiffs,

VS.

MEL PARKS, PARKS ENTERPRISES, INC., an Idaho corporation, NASKY JOINT VENTURE, a partnership, DEL TAYLOR, NANCY TAYLOR, his wife, LARRY ANDERSON, HAL PARKS, JERRY PARKS, STARLA PETERSON aka STARLA PARKS, BRYCE AVERILL, HARRY KEITH HUFFAKER, ELZA HUFFAKER, his wife, THOMAS GENE REID, MARY REID, his wife, WANDA HOPPER, PARKS & SONS SANITATION, INC., a Utah corporation, PARKS & SONS INTERMOUNTAIN, INC., an Idaho corporation, and JOHN DOES I through X,

Defendants.

JUDGMENT

CIVIL NO. 8579

The plaintiffs' complaint and the defendants' counterclaims came on for trial before the above-entitled Court on August 27 through 30, 1984. The plaintiffs were present and represented by

JUDGMENT ENTERED
[illegible] DOCKET

their attorney, Lowell V. Summerhays. Defendants Mel Parks, Del Taylor, Nancy Taylor, Hal Parks, Starla Peterson (now Starla Mayers), Bryce Averill, Harry Keith Huffaker, Elza Huffaker, Thomas Gene Reid, and Mary Reid (hereinafter "defendants") were each present at various times during the trial, and the defendants were represented by their attorneys, Jackson Howard and Leslie W. Slaugh. The Court having heard the plaintiffs' evidence, and the defendants having moved to dismiss the plaintiffs' action pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, and the Court having entertained arguments, and having previously entered its findings of fact and conclusions of law, now hereby makes and enters the following judgment:

1. The defendants are granted judgment, no cause of action, against the plaintiffs.

2. All restraining orders or injunctions previously entered in this matter against any of the defendants are vacated.

3. The counterclaims of the defendants for malicious prosecution and defamation are dismissed without prejudice.

4. Parks Enterprises, Inc., is awarded judgment on its counterclaim for reformation against Formen Corporation, and the "Memorandum of Partnership Dissolution Agreement" is reformed to include the following paragraph:

/////

/////

ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P O BOX 778
PROVO UTAH 84603
TELEPHONE 373 6345

Formen Corporation shall provide water without cost to Parks Enterprises, Inc., for the lots conveyed to Parks Enterprises, Inc., under this agreement. The water is to be provided in the same proportion as has been furnished or has been contracted to be furnished for other lots heretofore sold.

5. In accordance with the provisions of the "Memorandum of Partnership Dissolution Agreement" as herein modified, Formen Corporation is ordered to convey 69 acre feet of domestic use water rights to Parks Enterprises, Inc., within thirty days of the date of this judgment.

6. The defendants are awarded judgment against the plaintiffs, jointly and severally, pursuant to Utah Code Ann. §78-27-56 (Supp. 1983), for attorney's fees in the amount of $30,000.00, attorney office costs in the amount of $3,771.05, pretrial costs in the amount of $1,800.75, and trial costs in the amount of $_____, for a total of $_____.

DATED this 19 day of December, 1984.

BY THE COURT:

DON V. TIBBS, District Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 11th day of

/////

120 EAST 300 NORTH STREET
P O BOX 778
PROVO UTAH 84603
TELEPHONE 373 6345

December, 1984:

Mr. Lowell V. Summerhays
Attorney for Plaintiff
420 Continental Bank Building
Salt Lake City, Utah 84111

Amy L. McClure
SECRETARY

ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P O BOX 778
PROVO UTAH 84603
TELEPHONE 373 6345

JOINT VENTURE AGREEMENT

AGREEMENT made the 1ST day of May, 1978, between FORMEN CORPORATION, a Utah corporation, having its principal place of business in the State of Utah, hereinafter "Formen", and PARKS ENTERPRISES INC., an Idaho corporation, having its principal office and place of business at 11444 Ustick Road, Boise, Ada County, State of Idaho, hereinafter "Parks".

RECITALS

1. It is the desire of the parties to develop a tract of recreational land situated in Sanpete County, State of Utah, which is more particularly described on Exhibit "A" attached hereto.

2. The parties desire to form a joint venture for the development and sale of the recreational tract, according to the terms of this Agreement.

For the reasons herein set forth, and in consideration of the mutual covenants contained herein, the parties agree as follows:

SECTION I

Scope and Description

The parties hereby create a joint venture for the subdivision, development and sale of the recreational tract

identified as Exhibit "A". The venture shall be conducted name of Elk Ridge Ranches and the principal office located at Bountiful, Utah.

SECTION II

Contributions

Parks shall expend up to $180,000.00 to acquire the said tract of land to be developed, which is described on Exhibit "A" attached hereto.

Formen shall accept full liability and responsibility for the development of this tract and shall contribute all funds and expert services needed to develop said tract. Said funds and expertise to include but not be limited to developing a master subdivision plan, obtaining all governmental approvals, engineering, surveying, road construction, development, governmental reporting, promotion, zoning, inventory control, management of sales and collection of sales contracts. Parties agree that time is of the essence of this agreement and as a result it is necessary for Formen to proceed immediately in an orderly, workmanlike manner to effect the development of the project within 24 months from the date of this agreement.

In addition, it is understood that Formen has acquired the needed water rights required to develop the tract and sell the same in subdivided parcels. Parties agree that said water is essential to the intent of this Agreement. Title to said water, however, is subject to the completion of a purchase contract by Formen from the Rennert Investment

Company, Inc., a Utah corporation. Formen agrees to provide water rights to the parcels as they are sold on an "as needed" basis and further agrees to indemnify and hold Parks harmless from any liabilities resulting from the insufficiency of providing such water for the tract or any parcel thereof. In the event that Formen defaults under the terms of this agreement or in the event this venture shall not be completed or terminated short of its time, Formen does hereby grant to Parks the right to assume their position in the purchase contract with Rennert wherein Parks will acquire the water rights by completing the payments of the contract, said payments not to exceed the original purchase price of $75,000.00. A copy of the purchase contract for water rights between Formen as purchaser and Rennert as seller is attached hereto as Exhibit "B".

SECTION III

Conduct of Venture

Parks shall place $180,000.00 with Backman Abstract & Title Company with instructions to apply the same to the acquisition of the tract on or before May 3, 1978. Upon acquisition, Parks shall have the title conveyed to Backman Abstract & Title Company, as Trustee, and Backman Abstract & Title Company shall retain title and convey title to each lot as it is sold. Conveyance of the title to Backman Abstract & Title Company, as Trustee, shall be pursuant to a Trust Agreement between the parties to this joint venture and Backman Abstract & Title Company.

It is the parties intent that this Trust Agreement provide for an easy administrative method of properly transfering title to property when the sales price for the same has been fully paid and for the return of title to Parks in the event said property is not sold and/or this joint venture is terminated as provided herein.

Due to the nature of the land purchased, seventy-five percent (75%) of the cost of such property shall be allocated to the Easterly one-half and twenty-five percent (25%) allocated to the Westerly one-half.

Formen shall be responsible for carrying out the development and shall first develop and sell the lots constituting, approximately, the Easterly one-half of the tract. After the completion of the development of the Easterly one-half of the tract, the lots constituting approximately the Westerly one-half of the project shall be developed and sold. Formen shall be responsible for obtaining all necessary permits and approvals and for complying with all applicable ordinances and statutes. To carry out the work contemplated, Formen shall have full authority to order and pay for supplies and materials, to negotiate subcontracts for various aspects of the work and to assign its own employees to the project. Formen shall not, however, allow liens of any kind to be attached to the property as a result of its development activities. The occurrence of such a lien, if valid, will constitute a breach, by Formen, of this Agreement. Formen may cure any such breach by diligent, timely and persistent pursuit of the release of such lien or liens.

producing the same. All sales shall be subject to inventory control by Formen. All sales personnel shall be subject to and shall abide by all state and federal laws.

The minimum sales price for each parcel of property shall be established by mutual assent of both parties. No sale below such mutually established price can be made without the written consent of both parties. All questions relating to the sale of more than four (4) subdivided parcels, to any one purchaser shall be determined by mutual agreement of the parties.

The minimum down payment on any lot acceptable to the joint venture shall be five percent (5%) of the lot price. However, larger down payments and cash sales will be encouraged to facilitate early return of the parties' investments. No contract sale shall exceed ten (10) years of duration nor bear an annual interest rate of less than eight percent (8%) without the written consent of both parties.

SECTION VI

Records

Formen shall cause to be maintained a complete set of records, statements, and accounts concerning the total operation of the joint venture, in which shall be entered, fully and accurately, each transaction pertaining to the venture. Financial statements shall be prepared quarterly. All of the books shall be opened at all times for inspection and examination by Parks or its agent.

SECTION VII

Alienation of Interests

Neither party may lease, sell, transfer, mortgage, pledge, or encumber its interest herein or any assets which is a part thereof, without the written consent of the other party. Any alienation or encumberance made in violation of this provision will not be recognized, will constitute a breach of this Agreement and shall operate to terminate the Agreement at the option of the remaining party.

SECTION VIII

Term

This Agreement shall continue until all the parcels of the tract have been developed and sold or otherwise disposed of and the contract relating to the sale of the same have been collected or until May 1, 1993, whichever is sooner unless terminated by (1) written agreement of the parties, (2) an unauthorized alienation of interest, (3) a material breach of this Agreement by either party, (4) bankruptcy or any other involuntary dissolution of Formen or Parks, or (5) a substantial change in ownership and management of Formen.

SECTION IX

Termination

In the event of termination of this Agreement, all liabilities of the joint venture shall be paid and all unsold parcels and those held in default of sales contracts

shall be distributed to Parks by the trustee holding title to the same. Parks shall have the right to acquire the water rights pertaining to the said parcels at a price equal to Formen's cost.

If there is not sufficient cash to pay the joint venture liabilities, all loans to the parties shall be called for payment equal to the needs of the venture to pay its liabilities. The remaining balance of the assets shall be distributed equally to the parties.

SECTION X

Compensation

Except for the payment of sales commissions as provided herein, no salary, fees, commissions, or other compensation shall be paid by the venture to either party or to its officers, agent or employees, for services rendered to the venture or in connection with any of its business or property, except as may be expressly agreed to in writing by both parties.

SECTION XI

Agent or Representive

Each party shall designate in writing a representive which shall have the authority to speak in behalf of the said party and bind said party in decision required by this Agreement. Such designation may be relied on as existing and valid unless the same is revoked in writing and the same is received by the other party.

SECTION XII

Entire Agreement

This Agreement contains the entire agreement between the parties and supersedes and replaces any and all other agreements, written or oral, made at any time between the parties.

IN WITNESS WHEREOF, the parties hereto have caused the names of their duly authorized officers or agents to be signed hereunder.

FORMEN CORPORATION

By _____
J. Fred Smith, President

PARKS ENTERPIRSES INC.

By _____
M. Hal Parks, President

_____
Secretary, Starla Jean Peterson

STATE OF UTAH)
) ss
COUNTY OF)

On this 1ST day of MAY, 1978, before me the undersigned officer, personally appeared J. FRED SMITH, known to me to be the President of the above named Corporation, and that he as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein set forth, by signing the name of the Corporation by him as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Gary A Sargent
Notary Public
(SEAL) Residing at: Eden Heights Utah

STATE OF IDAHO)
) ss
COUNTY OF ADA)

On this _____ day of _____, 1978, before me the undersigned officer, personally appeared M. HAL PARKS, known to me to be the President of the above named Corporation, and that he, as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein set forth, by signing the name of the Corporation by him as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____
Notary Public
(SEAL) Residing at: _____

STATE OF IDAHO)
) ss
COUNTY OF ADA)

On this _____ day of _____, 1978, before me the undersigned officer, personally appeared STARLA JEAN PETERSON, known to me to be the Secretary of the above named corporation, and that she, as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein set forth, by signing the name of the corporation by her as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____
Notary Public
Residing at: _____

(SEAL)

S C H E D U L E A

The land referred to in this report is situated in the
County of Sanpete , State of Utah, and is described as follows:

The Northeast Quarter of the Southwest Quarter, the Southeast Quarter, and the South Half of the Southwest Quarter of Section 23, Township 12 South, Range 3 East, Salt Lake Meridian.

The South Half of Section 24, Township 12 South, Range 3 East, Salt Lake Meridian.

The North Half, and the Southwest Quarter of Section 25, Township 12 South, Range 3 East, Salt Lake Meridian.

The Northeast Quarter, the East Half of the Southeast Quarter, and the Northeast Quarter of the Northwest Quarter of Section 26, Township 12 South, Range 3 East, Salt Lake Meridian.

The South Half of the Southwest Quarter and the South Half of the Southeast Quarter of Section 19, Township 12 South, Range 4 East, Salt Lake Meridian.

Beginning at the Southeast Corner of the Southwest Quarter of the Southeast Quarter of Section 20, Township 12 South, Range 4 East, Salt Lake Meridian, thence West 60 chains; thence North 20 chains; thence East to the West line of the D. & R. G. W. RY. right of way; thence along the West line of said right of way in a Southeasterly, Southerly and Southwesterly direction to a point 3 rods North of the South line of said Section 20; thence East to a point 3 rods North of the point of beginning; thence South 3 rods to the point of beginning.

Lots 1 and 2 of Section 30, Township 12 South, Range 4 East, Salt Lake Meridian.

EXCEPTING THEREFROM any portion of said land which is included in the Deed Exception described as follows:

"The area approximately 40 acres in size containing and surrounding Hartney Lake, together with all water rights in and to the waters of said lake, and all easements and rights of way, including expressly a 2 rod right of way over the lands hereinabove described for access to and egress from said Hartney Lake, all of which were expressly reserved and retained by George N. Phelps and H. Clyde Coon, by the terms of an Agreement dated March 14, 1969, between George N. Phelps, Barbara Lee Phelps, Albert M. Johnson, Frank Lundberg and Duayne T. Johnson, as "Phelps Group", and Capitol Finance Company, as "Capitol" and as granted to George N. Phelps pursuant to a Right of Way Agreement executed by Capitol Finance Company and dated March 29, 1969. Said Hartney Lake is presumed to be located in the Southwest Quarter of the Northeast Quarter of Section 23, Township 12 South, Range 3 East, Salt Lake Meridian."

EXHIBIT "I"

MEMORANDUM OF
PARTNERSHIP DISSOLUTION AGREEMENT

THIS AGREEMENT is effective as of the 31st day of December, 1980, by and between PARKS ENTERPRISES, INC., an Idaho corporation, hereinafter referred to as "PARKS"; and FORMAN CORPORATION, a Utah corporation, hereinafter referred to as "FORMAN."

WHEREAS, the parties hereto previously entered into a Joint Venture Agreement for the subdivision, development and sales of a recreational tract of land commonly known as Elk Ridge Ranches near Indianola, Utah; and

WHEREAS, Forman desires to form another joint venture under the name "Hideaway Valley" with Parks for the subdivision, development and sale of a tract of land commonly known as the Morgan Ballard Ranch in Sanpete County, Utah; and

WHEREAS, a deadlock has arisen between the parties hereto as to the duties to be performed by the respective parties and as to the division and sharing of the profits and losses of the proposed Hideaway Valley Joint Venture; and

WHEREAS, the parties hereto now believe it to be in the best interest of each of them that their association with each other be dissolved.

NOW, THEREFORE, the parties mutually agree as follows:

1. TERMINATION OF JOINT VENTURE. The joint venture between the parties is hereby terminated as of the

2. DIVISION OF ASSETS AND LIABILITIES. The assets and liabilities of the Elk Ridge Ranches Joint Venture are hereby divided between the parties hereto as set forth on Exhibit "A" attached hereto and made a part hereof.

3. TAX CONSEQUENCES.

3.1 Pursuant to Tres. Reg. 1.453-9(c)(2), distribution by a partnership to a partner of installment obligations does not result in the recognition of gain or loss to either the partnership or the partner unless Internal Revenue Code Sections 736 and 751 apply. Said Sections apply to uneven distribution of unrealized receivables but do not apply to equal distribution of unrealized receivables in a partnership dissolution. Since the Elk Ridge Ranches operation results in a substantive amount of installment obligations and since the parties hereto have evenly divided the assets and liabilities of said operation, it is anticipated that there will be no adverse tax consequences upon this dissolution of said operation other than as provided in Internal Revenue Code Section 731 to the extent cash received exceeds a partner's adjusted basis in such operation before such distribution. Any disposition of the assets received by the parties hereto in such dissolution may, of course, result in other tax consequences depending upon the particular circumstances then present.

3.2 Forman was the managing venturer in said

or activities will cause dissolution to result in any adverse tax consequences not contemplated above or will result in any adverse tax consequences not previously reported to the appropriate tax authorities for either the Elk Ridge Ranches or Hideaway Valley ventures, then all such adverse tax consequences will be for all purposes the sole responsibility of Forman and Forman shall indemnify and hold Parks harmless from any and all such adverse tax consequences and any further adverse tax consequences caused by such adverse tax consequences being the sole responsibility of Forman. The phrase "adverse tax consequences" shall include all taxes, interest and penalties imposed.

4. ENTIRE AGREEMENT. This Agreement contains the entire agreement between the parties and modifies and supercedes all prior written or oral agreements between them.

5. BOARD OF DIRECTORS APPROVAL. Each of the parties hereto have previously had this Agreement approved by their respective Boards of Directors.

6. FULL DISCLOSURE. Each party hereto has fully disclosed to the other all information which would be pertinent to such party in making its decision to enter into this Agreement.

7. SEVERABILITY. Any provision of this Agreement which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision hereof, and the remaining provisions shall, nevertheless, remain in

8. SUCCESSORS IN INTEREST. This Agreement shall be binding upon the successors, assigns, directors, officers and shareholders of the parties hereto.

9. ATTORNEYS' FEES. In the event that a party hereto places this Agreement with an attorney for enforcement or if suit be instituted for its enforcement, the other party agrees to pay, in either case, reasonable attorneys' fees.

The parties hereto have executed this Agreement as of the day and year first above written.

PARKS ENTERPRISES, INC.

By: _____
President

Attest: Nancy Taylor
Secretary

FORMAN CORPORATION

By: _____
President

Attest: _____
Secretary

EXHIBIT "A"

DIVISION OF ASSETS AND LIABILITIES
USING FAIR MARKET VALUES

t.#	Lot #	Forman Corporation Fair Mkt. Value	Acreage	Parks Enterprises, Inc. Fair Mkt. Value	Acreage
0	1	$		$ 10,200.00 open lot	
0	2	14,091.71			
0	3	25,074.02			
0	4		10.0		
0	5	3,864.49			
0	6			10,625.00 open lot	
0	7		6.0		
4	W½8	7,474.55			
2	E½9			9,756.16	
4	W½9	8,535.26			
2	E½10			9,003.05	
0	11			13,577.14	
0	12			8,877.36	
0	13			16,827.40	
)	14	8,903.82			
)	N½15	7,946.74			
3	S½15	7,421.76			
)	16	12,254.57			
)	17			11,213.36	
)	18		Back to FC ←	18,615.00)	
)	19	14,305.50			
)		5,530.28			
.	N½21	6,294.43			
3	S½21			13,175.00	
)	22			16,575.00	
)	23			14,370.14	
)	24	11,996.70			
)	25	7,226.57			
)	26			17,850.00 open lot	
.	N½27	4,431.70			
3	S½27			8,287.50 open lot	
.	N½28	5,144.83			
3	S½28			12,580.00	
)	29	15,148.65			
)	30	14,908.89			
)	31			13,668.99	
)	32		Back to FC ←	14,450.00)	
)	33			19,422.39	
	N½34			8,202.50	
	S½34			9,295.77 open lot	
	N½35	7,886.84			
	S½35			8,223.42	
	36	14,620.00			
	38	17,850.00			
	39	16,150.00			
	40	14,016.50			

ct.#	Lot #	Forman Corporation Fair Mkt. Value	Acreage	Parks Enterprises, Inc. Fair Mkt. Value	Acreage
34	W 43	$		$ 7,144.03	
41	N 44			9,032.38	
51	N 45			8,333.88	
53	S 45				10.0
50	N 46	5,773.17			
53	S 46				9.8
70	47			15,725.00	
30	48			17,018.04	
9	49			8,116.09	
0	50			8,850.23	
.1	N 51			8,196.25	
.3	S 51			9,672.57	
0	52			14,689.04	
1	N 54				10.1
3	S 54			9,180.00 Open-st	
1	N 55				9.95
0	56	14,727.31			
1	N 57			7,724.93	
3	S 57	10,583.88			
0	58	17,340.00			
0	59	9,217.44			
1	N 60			9,137.50 Open-st	
3	S 60			9,735.36	
1	N 61			8,925.00 Open-st	
3	S 61			9,160.16	
1	N 62			9,070.76	
0	63	16,799.91			
4	W 64	10,445.19			
2	E 64		Back to F.C. ←	9,605.00	
3	S 65	8,782.82			
1	N 65			8,925.00	
0	E 66			10,696.02	
4	W 66			7,862.50	
0	67			16,873.24	
2	E 68			9,445.47	
4	W 68			9,274.57	
0	69			17,244.87	
0	70			14,450.00	
0	71	15,709.30			
1	N 72			10,253.20	
3	S 72			9,588.61	
0	73	14,981.87			
0	74	7,348.83			
0	75	9,200.47			
0	76	12,116.08			
0	77	18,595.00			
1	N 78		5.0		
3	S 78	5,690.76			
2	E 79	7,638.12			
1	W 79			7,793.77	

Acct.#	Lot #	Forman Corporation Fair Mkt. Value	Acreage	Parks Enterprises, Inc Fair Mkt. Value	Acre:
820	82	$ 9,334.49		$	
830	83	8,907.85			
840	84	13,454.23			
850	85	14,113.37			
860	86			8,976.60	
870	87			10,025.01	
880	88			8,800.39	
890	89	6,705.00			
900	90			14,344.71	
910	91	15,725.00			
921	N 92	3,465.51			
923	S 92	14,067.50			
931	N 93	7,708.87			
933	S 93	7,708.87			
940	94	15,450.00			
960	96			19,528.81	
972	E 97	8,660.50			
974	W 97		10.0		
980	E 98	16,086.51			
984	W 98	12,732.62			
		$634,674.30[1]	42.30	$635,360.66[2]	39.9

Consists of contracts, lots and sales proceeds from sale of contracts.

Consists of contracts and lots.

	Total	Forman Corporation	Parks Enterprises,
. The cash is divided equally	$ 56.33	$ 28.17	$ 28.16
. Notes payable	80.30	40.15	40.15
. Customers Deposits	177.54	88.77	88.77

LESLIE W. SLAUGH, FOR:
HOWARD LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P O BOX 778
PROVO UTAH 84603
TELEPHONE 373-6345

Wayne B. Beck
Sixth Judicial District
Sanpete County, Utah
By: Wanda Haggard Deputy
8-27-84

Attorneys for Defendant

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY
STATE OF UTAH

FORMEN CORPORATION, a Utah corporation, DON SKIPWORTH, and FRED SMITH, Plaintiffs, vs. MEL PARKS, PARKS ENTERPRISE, INC., an Idaho corporation, NASKY JOINT VENTURE, a parnter-ship, DEL TAYLOR, NANCY TAYLOR, his wife, LARRY ANDERSON, HAL PARKS, JERRY PARKS, STARLA PETERSON aka STARLA PARKS, BRYCE AVERILL, HARRY KEITH HUFFAKER, ELZA HUFFAKER, his wife, THOMAS GENE REID, MARY REID, his wife, WANDA HOPPER, PARKS & SONS SANITATION, INC., a Utah corpora-tion, PARKS & SONS INTERMOUNTAIN, INC., an Idaho Corporation, and JOHN DOES I through X, Defendants.	SUMMARY JUDGMENT ON COUNTERCLAIM ON FORECLOSURE DEFENDANTS Civil No. 8579 JUDGE [illegible]

No. 5 "F"

The defendants' "Motion for Summary Judgment on [Counterclaim] of Foreclosure Defendants," filed on behalf of defendants Bryce Averill, Harry Keith Huffaker, Elza Huffaker, Thomas Gene Reid, and Mar Reid, came on before the above entitled Court for hearing on

the 21st day of December, 1983,. The moving defendants were not present, but were represented by their attorneys, Jackson Howard and Leslie W. Slaugh. J. Fred Smith, president of the Foremen Corporation, was present and Formen Corporation was represented by its attorney, Lowell V. Summerhays. The Court having heard arguments, and having reviewed the memoranda submitted by both parties, and having determined that there is no dispute as to any material issue of fact and that the defendants are entitled to judgment as a matter of law, now hereby makes and enters the following judgment:

1. Bryce Averill is awarded judgment against Formen Corporation in the sum of $2,549.00, together with prejudgment interest in the amount of $612.68, for a total of $3,161.68.

2. Thomas Gene Reid and Mary Gene Reid are granted judgment against Formen Corporation in the sum of ~~$2,085.75~~ $2,085.75 OJ+, together with prejudgment interest in the amount of $496.70, for a total of $2,582.45.

3. Harry Keith Huffaker and Elza Huffaker are granted judgment against Formen Corporation in the sum of $3,022.36, together with prejudgment interest in the amount of $759.78, for a total of $3,782.14.

4. Interest shall accrue on these judgments at the rate of 12% per annum from the date of entry.

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120 EAST 300 NORTH STREET
P O BOX 778
PROVO UTAH 84603
TELEPHONE 373 6345

DATED this 27 day of ~~July~~ August, 1984.

BY THE COURT:

Don V. Tibbs, Judge

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Summary Judgment on Counterclaim on Foreclosure Defendants to Lowell V. Summerhays, 420 Continental Bank Building, Salt Lake City, Utah 84111, postage prepaid, this 16th day of July, 1984.

ATTORNEYS AND COUNSELORS AT LAW
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